Supreme Court, U.S.
FILED
99 163 JUL 22 1999
OFFICE OF THE CLERK

No. 99-___

In The

Supreme Court of the United States

CYNTHIA and ROBERT BAGLEY, GARY and CYNTHIA ST. PIERRE, DENNIS and PATRICIA COLE, RICKY and MARY THORNTON, AND JACK and STACIA FITCH,

Petitioners,

v.

RAYMOND SCHOOL DEPARTMENT, MAINE DEPARTMENT OF EDUCATION and its COMMISSIONER J. DUKE ALBANESE, TIMOTHY HUMPHREY, JANE HUMPHREY, FRANK MCDERMOTT, TIMOTHY MORIN, JOAN MORIN, TIMOTHY FITZGERALD, KEN WILLIAMS, BARBARA WILLIAMS, and the MAINE CIVIL LIBERTIES UNION,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

PETITION FOR WRIT OF CERTIORARI

LINDA C. RUSSELL
PETRUCCELLI & MARTIN
50 Monument Square
P.O. Box 9733
Portland, Maine 04104-5033
(207) 775-0200

WILLIAM H. MELLOR
CLINT BOLICK*
RICHARD D. KOMER
MATTHEW B. BERRY
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 955-1300

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the establishment clause of the U.S. Constitution require the exclusion of religious schools from Maine's tuitioning program, which allows parents to choose from an array of public and private schools for their children's education?

LIST OF PARTIES

The parties to the proceedings below were petitioners Cynthia and Robert Bagley, Gary and Cynthia St. Pierre, Dennis and Patricia Cole, Ricky and Mary Thornton, and Jack and Stacia Fitch; and respondents Maine Department of Education and its Commissioner J. Duke Albanese, the Raymond School Department, Timothy Humphrey, Jane Humphrey, Frank McDermott, Timothy Morin, Joan Morin, Timothy Fitzgerald, Ken Williams, Barbara Williams, and the Maine Civil Liberties Union.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

A. Statement of Facts 2

B. Proceedings Below 6

REASONS FOR GRANTING THE WRIT 10

I. STATE AND FEDERAL COURTS ARE CLEARLY DIVIDED ON THE QUESTION OF WHETHER THE ESTABLISHMENT CLAUSE PERMITS INCLUSION OF RELIGIOUS SCHOOLS IN PARENTAL CHOICE PROGRAMS 10

A. A CLEAR AND DIRECT CONFLICT OF AUTHORITY EXISTS BETWEEN THE ESTABLISHMENT CLAUSE DECISION OF THE COURT BELOW AND DECISIONS OF THE VERMONT, WISCONSIN, ARIZONA, AND OHIO SUPREME COURTS 11

B. THE MAINE DECISION DIRECTLY CONFLICTS WITH THE EIGHTH CIRCUIT'S DECISION IN *PETER V. WEDL* 16

C. THE MAINE SUPREME COURT'S DECISION WOULD CUT A WIDE SWATH OF DESTRUCTION THROUGH FEDERAL AND STATE PROGRAMS 18

TABLE OF CONTENTS – Continued

Page

II. THE MAINE DECISION THREATENS EDUCATION REFORM EFFORTS ACROSS THE COUNTRY 22

A. THE *BAGLEY* DECISION THREATENS STATE EFFORTS TO USE RELIGION-NEUTRAL CRITERIA IN PARENTAL CHOICE PROGRAMS 22

B. THIS COURT'S REVIEW OF *MITCHELL V. HELMS* WILL NOT RESOLVE THE ISSUE OF RELIGION-NEUTRAL CRITERIA IN PARENTAL CHOICE PROGRAMS..... 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 9, 13, 17, 21

Board of Education v. Allen, 392 U.S. 236 (1968) 12

Bowen v. Kendrick, 487 U.S. 589 (1988) 21

Campbell v. Manchester Board of Sch. Directors, 641 A.2d 352 (Vt. 1994) 3, 13, 14

Chittenden Town Sch. Dist. v. Vermont Dep't of Educ., No. 97-375, 1999 Vt. LEXIS 98 (Vt. June 11, 1999) 13

Christen G. v. Lower Merion Sch. Dist., 919 F. Supp. 793 (E.D. Pa. 1996) 18

Christian Science Reading Room v. San Francisco Airports Auth., 784 F.2d 1010 (9th Cir.), as amended, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) 11

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 17

Columbia Union College v. Clarke, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3755 (June 14, 1999) 21

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) ..... *passim*

Everson v. Board of Educ., 330 U.S. 1 (1947) 11, 12

Griffith v. Bower, No. 99-CH-0049 (Ill. Cir. Ct., filed July 12, 1999) 23

Hernandez v. Commissioner, 490 U.S. 680 (1989) 7

Holmes v. Bush, No. 99-3370 (Fla. Cir. Ct., filed June 22, 1999) 23

TABLE OF AUTHORITIES – Continued

Page

Hunt v. McNair, 413 U.S. 734 (1973) 21

Jackson v. Benson, 578 N.W.2d 602, *cert. denied*, 119 S.Ct. 466 (1998) 14, 15

Kotterman v. Killian, 972 P.2d 606 (1999), *cert. pet. pending*, 67 U.S.L.W. 3671 (April 26, 1999) 15

Lemon v. Kurtzman, 403 U.S. 602 (1971) 8, 24

Matthew J. v. Massachusetts Dep't of Educ., 989 F. Supp. 380 (D. Mass. 1998) 18

Mitchell v. Helms, 151 F.3d 347 (1998), *cert. granted*, 67 U.S.L.W. 3756 (June 14, 1999) 24

Mueller v. Allen, 463 U.S. 388 (1983) 13, 15

Native American Council of Tribes v. Solem, 691 F.2d 382 (8th Cir. 1982) 17

Peter v. Wedl, 155 F.3d 992 (1998) 17

Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976) 21

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) 10, 17, 20

School Comm. of Burlington v. Massachusetts Dep't of Educ., 471 U.S. 359 (1985) 17, 18

Simmons-Harris v. Goff, No. 97-1117, 1999 Ohio LEXIS 1893 (Ohio May 25, 1999) 15, 16, 20

Strout v. Albanese, No. 98-1896, 1999 U.S. App. LEXIS 10932 (1st Cir. May 27, 1999) 11, 12

Swart v. South Burlington Sch. Dist., 167 A.2d 514, *cert. denied*, 366 U.S. 925 (1961) 13

Tilton v. Richardson, 403 U.S. 672 (1971) 21

TABLE OF AUTHORITIES – Continued

Page

United States v. Lopez, 514 U.S. 549 (1995) 22

Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986) 9, 13, 16, 24

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) 13, 17

CONSTITUTIONS

U.S. Const. amend. I..... 1, 4, 10, 11, 14, 21

U.S. Const. amend. XIV..... 2

Me. Const., art. I, § 3..... 6

Me. Const., art. I, § 6-A 6

Me. Const., art. VIII 6

STATUTES

20 U.S.C. §§ 1400 *et seq.* (Individual with Disabilities Act – IDEA)..... 17

20 U.S.C. §§ 1070 *et seq.* (Basic Educational Opportunity Grants) 19

20 U.S.C. §§ 1070a *et seq.*..... 19

20 U.S.C. §§ 1070b *et seq.* (Supplemental Educational Opportunity Grants) 19

20 U.S.C. §§ 7301-7373..... 24

28 U.S.C. § 1257..... 1

38 U.S.C. §§ 1661 *et seq.*..... 19

42 U.S.C. §§ 1395 *et seq.*..... 19

42 U.S.C. §§ 1396b *et seq.*..... 19

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. §§ 1437f *et seq.* 19

42 U.S.C. §§ 1751 *et seq.* 19

42 U.S.C. § 1983 6

A.R.S. § 43-1089 (Arizona School Tuition Organization Tax Credit Program) 15

Colo. Rev. Stat. § 23-3.5-102 19

Fla. Stat. ch. 229.0537 23

35 ILCS 5/201(m) (Illinois Education Expense Credit Act) 23

20-A M.R.S.A. § 2951 2

20-A M.R.S.A. § 2951(2) 4, 6

20-A M.R.S.A. § 5204(4) 2

20-A M.R.S.A. § 5805 4

20-A M.R.S.A. § 5806 4

20-A M.R.S.A. §§ 11611 *et seq.* 19

Ohio Rev. Code Ann. §§ 3313.974-.979 (Cleveland Scholarship Program) 15, 22

Wash. Rev. Code § 28B.10.814 19

Wis. Stat. § 119.23 (Milwaukee Parental Choice Program) 22

OTHER AUTHORITIES

1981 Me. Laws Ch. 693 4

Op. Me. Att'y Gen. 80-2 (1980) 4

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS PUBLICATIONS

Ava Harriet Chadbourne, *History of Education in Maine* (1936) 3

R.A. Dyer, "Voucher Bill Killed Again in Legislature," *Fort Worth Star-Telegram* (June 6, 1999) 23

Lois Fecteau, "Vouchers Fall Flat in Voting," *Albuquerque Journal* (May 10, 1999) 23

Frank Reeves and Peter J. Shelly, "Ridge Fails on Vouchers," *Pittsburgh Post-Gazette* (June 18, 1999) 23

Thomas Suddes, "$17.2 Billion Spending Bill Passes: Voucher Program Included in Budget," *The Plain Dealer* (June 25, 1999) 16

PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Maine Supreme Judicial Court Sitting As The Law Court, entered in the above-entitled proceeding on April 23, 1999.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court Sitting As The Law Court has not been reported and is reprinted in the appendix hereto, p. 1, *infra*.

The opinion of the Cumberland County Superior Court has not been reported and is reprinted in the appendix at p. 58, *infra*.

JURISDICTION

The judgment of the Maine Supreme Judicial Court Sitting As The Law Court was entered on April 23, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution provides in pertinent part as follows: "Congress shall

make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The Fourteenth Amendment of the United States Constitution provides in pertinent part as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The text of 20-A M.R.S.A. §§ 2951 and 5204(4) are reproduced in the appendix at pp. 63-64, *infra*.

STATEMENT OF THE CASE

A. Statement of Facts

Like the New England town meeting, Maine's tuitioning system, used by more than half of Maine's school districts, is an enduring legacy of an earlier time. And just as the town meeting is an example of a pure democracy, Maine's tuitioning system is an example of pure parental school choice. Districts using the system do not operate public schools themselves, but instead pay tuition to whatever public or private schools the students' parents select.

Or at least that was the case until 1981, when the Maine legislature introduced a regime of discrimination by removing parents' ability to select religious schools for their children's education. The legislature did this in the mistaken belief that the establishment clause, as interpreted in this Court's decision in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), required the exclusion of religious schools from parents' options. The

Maine courts now have compounded this error by refusing to recognize that this Court's decisions do not mandate such discrimination.

Maine's tuitioning system,[1] which traces its antecedents back over 200 years to a period long before there were public secondary schools,[2] permits local school districts an alternative to the standard educational paradigm of providing public education through the operation of public schools. The Raymond School Department, for example, which administers the district in which petitioners reside, does not operate a public high school; instead each high school student in Raymond attends a private or out-of-district public high school chosen by his or her parents. The role of the tuitioning district is limited to paying tuition to the school selected by the families. The districts send the tuition payments directly to the

---

[1] Vermont has a similar tuitioning system, discussed in *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994). As appears below, other states are experimenting with various forms of school choice, particularly in response to the current crisis in urban public education. Moreover, though school choice programs are still fairly uncommon at the K-12 level, the Maine system resembles the system of post-secondary education in most if not all states, wherein states operate public colleges and universities and provide tuition assistance for students to attend the public or private institution of their choice. While most states and the federal government permit the use of such aid in religious colleges, some states do not. See p. 23 n.16, *infra*.

[2] Maine towns have been paying tuition for residents to attend private schools since those schools were first established beginning in the late 1700's. See Ava Harriet Chadbourne, *History of Education in Maine* 31-39 (1936).

schools to be credited to the students' accounts.[3] In the 1996-97 school year, 145 of Maine's 284 districts were tuitioning districts.

Prior to 1981, Maine's tuitioning system treated all approved private schools alike, making no distinction between those that were religious and those that were not. But in response to an Opinion of the Attorney General,[4] which concluded that the establishment clause required the exclusion of religious schools from the heretofore neutral system, Maine enacted 20-A M.R.S.A. § 2951(2).[5] The statutory amendment provided that a "private secondary school may be approved for the receipt of public funds only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." *Id.*

Before this change took place, tuitioning to religious schools occurred routinely and without controversy, although relatively few parents chose this option. In the last school year before the program was changed (1980-81), Maine towns tuitioned 17,928 students, with

---

[3] Generally speaking, the amount of tuition paid to public or private schools is the lesser of two figures, the actual average cost of education at the particular school or the statewide average per public secondary student cost. See 20-A M.R.S.A. §§ 5805 and 5806. The parents are responsible for paying any excess tuition costs.

[4] See Op. Me. Att'y Gen. 80-2 (1980).

[5] 1981 Me. Laws Ch. 693.

only 211 attending religious schools chosen by their families. This constituted a mere 1.2% of the total, and only 4.0% of those tuitioned to private schools.[6]

The amendment forced families to henceforth choose between receiving tuition for a public or nonreligious private school or foregoing tuition by choosing a religious school. Previously, the Raymond School Department had paid tuition for students to attend several religious high schools in Portland, Maine, including Cheverus High School, a Jesuit school for boys. After the statutory change, however, Raymond ceased paying tuition for any of its students whose families selected religious schools. Raymond families continued to select Cheverus for their sons, although now, unlike their neighbors who selected nonreligious schools, they were forced to forego public tuitioning and incur the entire tuition costs themselves.

The petitioners, five Raymond couples who send their sons to Cheverus, requested that their school board pay tuition on their behalves to Cheverus. The board refused, citing the statutory exclusion of religious schools from the tuitioning system. Believing that they had a right to be treated equally regardless of whether they selected a religious or nonreligious school for their children, the petitioners filed this suit in Cumberland County Superior Court on July 31, 1997.

---

[6] Affidavit of James E. Watkins, Jr., Appendix to petitioners' brief below at 213-14.

B. Proceedings Below

Petitioners alleged that the district's failure to provide them with the tuitioning benefits received by other parents violated the establishment and free exercise clauses of the First Amendment as well as the equal protection clause of the Fourteenth Amendment. They also alleged violations of corresponding provisions of the Maine Constitution.[7] They named as defendants the Maine Department of Education and its Commissioner, who are responsible for administering the tuitioning program statewide, and their local school district, the Raymond School Department, which is responsible for making any actual payments of tuition on the parents' behalves. On unopposed motions, a group of Raymond taxpayers and the Maine Civil Liberties Union intervened as defendants in the action.

After dismissal of the school district,[8] the petitioners and remaining defendants filed cross-motions for summary judgment. In a brief decision, the Superior Court granted the defendants' motion and denied that of the petitioners. It held that 20-A M.R.S.A. § 2951(2) did not violate any of the constitutional provisions petitioners invoked. App. 6.

On appeal, the Maine Supreme Judicial Court affirmed the lower court in a five-to-one decision. The

---

[7] Me. Const., arts. I, §§ 3, 6-A, and VIII.

[8] The trial court below ruled that the district is relieved of liability under 42 U.S.C. § 1983 because it was following state law. Petitioners' appeal of this ruling was not addressed by the Maine Supreme Judicial Court below, and thus would not be at issue should this Court grant the writ requested.

Court first addressed the state constitutional claims, concluding that "the rights guaranteed by the United States Constitution and the Maine Constitution are coextensive" with the Maine Constitution providing no greater rights. App. 8. Turning to petitioners' free exercise claim, the Court noted that only one of the petitioner families, the Bagleys, claimed a religious motivation for their decision to send their son to Cheverus and declined to resolve the defendants' contention that obtaining a Catholic secondary education for the Bagleys' son was not "central" to the family's religious beliefs. The Court assumed *arguendo* that the Bagleys had so shown, but concluded that the Bagleys had failed to show that any "substantial burden" had been imposed on the free exercise of their beliefs, under the test established in *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). App. 11. The Court also rejected petitioners' claim that the establishment clause requires governmental neutrality between believers and nonbelievers, neither favoring nor disfavoring one or the other. App. 16-17.

Petitioners' claim that Maine's discriminatory law denied them the equal protection of the laws received more extended treatment from the Court. The Court found that although strict scrutiny of the religious classification was appropriate, the issue of the degree of scrutiny was academic, because if the exclusion were not required by the establishment clause then it would fail even the rational basis test. "The State offers only one justification for the statute – an effort to comply with the Establishment Clause. . . . If the State's justification is

based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level of scrutiny." App. 22.

Unlike four other state supreme courts, however, the Maine Supreme Court concluded that the establishment clause did indeed require the exclusion of religious schools from the choices available to families under the tuitioning program. It found that the 1981 amendment was required both by this Court's precedents as they stood in 1980 and as they stand today, notwithstanding its recognition that this Court's more recent jurisprudence takes a less restrictive view of the "effects" prong of the test first set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). App. 30. Applying that test, the Court held that inclusion of religious schools among parents' choices would have the primary effect of advancing religion.[9]

The Court rejected petitioners' argument that this Court's decision in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 782-83 n.38 (1973), striking down tax benefits offered exculsively to private school parents, did not apply to the facts of this case because this Court had specifically reserved the question of whether the "significantly religious character of the statute's beneficiaries might differentiate the present case from a case

---

[9] Although the Court discussed the entanglement aspect of the *Lemon* test, it reached no definitive conclusion, preferring to rest upon its holding that the effects prong would be clearly violated. It opined that a remand to the trial court for further development of the record would be necessary if the entanglement issue were to be dispositive. App. 44.

involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." The Court also rejected petitioners' argument that this Court's precedents consider aid to be indirect if it reaches religious institutions "only as a result of the genuinely independent and private choices of aid recipients." *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 487 (1986). Nor did the Court find dispositive this Court's subsequent line of cases in which it has "departed from [the] rule . . . that all government aid that directly aids the educational function of religious schools is invalid." *Agostini v. Felton*, 521 U.S. 203, 225 (1997). The Maine Court also found unpersuasive the decisions of other state supreme courts that have permitted parents to select religious schools in school choice programs, discussed *infra*, but without explaining why it did so. App. 36.

The Court based its conclusion that the inclusion of religious schools would have the primary effect of advancing religion on the fact that tuition payments would be made directly to religious schools, a feature which the Court characterized as providing direct subsidies of religious education. In the Court's view, by providing unrestricted tuition payments on behalf of parents, the program would be aiding the religious function of the schools. The Court simply assumed without analysis that because tuition payments are made directly to the schools they are subsidizing those schools, rather

than the parents' educational choices, and that such subsidies ipso facto violate the First Amendment.[10]

Justice Clifford dissented, concluding that the statute violated the equal protection clause by discriminating on the basis of religion. He found that the establishment clause did not justify the complete exclusion of religious schools from the tuitioning program when a more narrowly tailored program could be created that would both lessen the discrimination based on religion and comply with the establishment clause. In his view, the establishment clause was not "intended to provide States with a blanket justification for discriminating against religion." App. 53-54.

REASONS FOR GRANTING THE WRIT

I. STATE AND FEDERAL COURTS ARE CLEARLY DIVIDED ON THE QUESTION OF WHETHER THE ESTABLISHMENT CLAUSE PERMITS INCLUSION OF RELIGIOUS SCHOOLS IN PARENTAL CHOICE PROGRAMS.

In this case, the Maine Supreme Judicial Court has decided an important establishment clause question in a

---

[10] The Court below also rejected petitioners' claim that the religious school exclusion violated their free speech rights, saying that "the parents cannot assert that they have been denied a forum for any type of speech." App. 44. The Court distinguished *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), on the grounds that in that case the publication subsidies did not flow directly into the religious group's coffers. App. 45.

manner conflicting with decisions of four other state courts of last resort and a federal court of appeals. The split in authority on this issue is exacerbated by a recent First Circuit decision on the same program at issue here, which reached the same result as the court below. See *Strout v. Albanese*, No. 98-1896, 1999 U.S. App. LEXIS 10932 (1st Cir. May 27, 1999). This question is central both to the continued development of this Court's First Amendment jurisprudence and to vital efforts being undertaken in many states to improve elementary and secondary education. As such, it warrants resolution by this Court.

A. A CLEAR AND DIRECT CONFLICT OF AUTHORITY EXISTS BETWEEN THE ESTABLISHMENT CLAUSE DECISION OF THE COURT BELOW AND DECISIONS OF THE VERMONT, WISCONSIN, ARIZONA, AND OHIO SUPREME COURTS.

As the Maine Supreme Court recognized, resolution of the petitioners' equal protection claim required it to determine whether the establishment clause obligated the state to exclude religious schools from the range of public and private choices the tuitioning system allows parents to make. The Court found that the state had offered no justification for its 1981 exclusion other than avoiding an establishment clause violation. App. 24.[11]

---

[11] See *Christian Science Reading Room v. San Francisco Airports Auth.*, 784 F.2d 1010 (9th Cir.), as amended, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987).

Petitioners seek review of the Court's subsequent conclusion that the exclusion is required by the establishment clause.

In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), this Court invalidated programs providing direct maintenance grants to religious schools and tax relief and tuition subsidies to families using private schools, the vast majority of which were religious. This Court, however, specifically left open the question of whether a program of public assistance, such as a scholarship program, that made its benefits available generally without regard for the sectarian-nonsectarian or public-nonpublic nature of the institution benefited might be distinguishable from that case. This Court distinguished the programs in *Nyquist* from those in *Everson v. Board of Education*, 330 U.S. 1 (1947) (providing transportation subsidies), and *Board of Education v. Allen*, 392 U.S. 236 (1968) (providing free textbooks), where the class of beneficiaries included all schoolchildren whether in public or private schools. *Nyquist*, 413 U.S. at 782-783 n.38. The Maine program, however, is similar to the programs in *Everson* and *Allen* in that it benefits all students and epitomizes precisely the sort of neutral program this Court made a specific point of not foreclosing in *Nyquist*.

The Maine Supreme Court's interpretation of the establishment clause, along with the First Circuit's decision in *Strout*, is inconsistent with the rationale of this Court's subsequent establishment clause jurisprudence and with four other state supreme court decisions that rely on the *Nyquist* factors to uphold state programs that include religious schools among parental choice options.

In *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); and *Agostini v. Felton*, 521 U.S. 203 (1997), this Court emphasized that the establishment clause is not violated where a program provides benefits in a neutral fashion to individuals who independently choose to use their benefits at a religious service provider.

The four state supreme courts besides Maine's that recently have considered parental school choice programs in the establishment clause context have faithfully applied this Court's precedents. In *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (1994), the Vermont Supreme Court addressed a tuitioning program virtually identical to Maine's. Relying on this Court's post-*Nyquist* establishment clause jurisprudence, the Court overruled its 1961 precedent excluding the choice of religious schools.[12] Finding that jurisprudence to have evolved greatly since 1961, specifically in giving greater emphasis to the role played by parental choice, the Court permitted the reimbursement of a parent's tuition costs incurred in sending his son to a religious school.[13]

---

[12] See *Swart v. South Burlington Sch. Dist.*, 167 A.2d 514, *cert. denied*, 366 U.S. 925 (1961).

[13] Subsequent to *Campbell*, the Vermont Department of Education prohibited tuitioning districts from reimbursing parents for tuition, ordering that they pay the tuition directly to the schools selected by the parents. It also opined that such direct payments, unlike the reimbursements ordered in *Campbell*, would violate the establishment clause. This result was challenged by a tuitioning district in *Chittenden Town School District v. Vermont Department of Education*, No. 97-275, 1999 Vt.

Last year, in *Jackson v. Benson*, 578 N.W.2d 602, *cert. denied*, 119 S.Ct. 466 (1998), the Wisconsin Supreme Court upheld the Milwaukee Parental Choice Program, Wis. Stat. § 119.23, against an establishment clause challenge. That program allows low-income students in the Milwaukee public schools to use their portion of state aid to attend the private school of their choice, including religious schools. Distilling the principles set forth in this Court's jurisprudence, the Wisconsin Supreme Court found that "state educational assistance programs do not have the primary effect of advancing religion if those programs provide aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children." *Id.* at 617. The Court observed that the Milwaukee Parental Choice Program exists against the backdrop of a wide range of educational options, the vast majority of them involving public schools. *Id.* at 618 n.16. Accordingly the Court concluded that the parental choice program did not violate the establishment clause, because it "place[d] on an equal footing options of public and private school choice, and vest[ed] power in the hands of parents to choose where to direct the funds for their children's benefit." *Id.* at 619.

LEXIS 98 (Vt. June 11, 1999), in which for the first time the Vermont Supreme Court held its state constitution to be more restrictive than the establishment clause. Relying solely on state grounds to invalidate payments to religious schools, the Vermont Supreme Court did not overturn its First Amendment decision in *Campbell*.

Similarly, this year the Arizona Supreme Court accurately applied this Court's precedents in *Kotterman v. Killian*, 972 P.2d 606 (1999), *cert. pet. pending*, 67 U.S.L.W. 3671 (April 26, 1999). The Court upheld the Arizona School Tuition Organization Tax Credit Program, A.R.S. § 43-1089, which provides a credit from state income tax of up to $500 for contributions to school tuition organizations, which must devote at least 90 percent of their revenue to scholarships to children attending qualifying nongovernmental schools chosen by their parents. Finding *Mueller v. Allen*, 463 U.S. 388 (1983), to be this Court's most applicable precedent, the Arizona Supreme Court found that the tax credit was only one among many provided by the state for a variety of purposes, and that the funds reach religious schools only through "multiple layers of private choice." *Kotterman*, 972 P.2d at 612-14. In sum, the Court concluded that the tax credit "is completely devoid of state intervention or direction and protects against the government 'sponsorship, financial support, and active involvement' that so concerned the framers of the Establishment Clause." *Id.* at 614.

Most recently, the Ohio Supreme Court decided *Simmons-Harris v. Goff*, No. 97-1117, 1999 Ohio LEXIS 1893 (Ohio May 25, 1999), upholding the Cleveland Scholarship Program, Ohio Rev. Code Ann. §§ 3313.974-.979, under the establishment clause. Like the Milwaukee program upheld by the Wisconsin Supreme Court in *Jackson*, the Ohio program allows low-income families in Cleveland to take advantage of partial tuition vouchers for use in private schools, including religious ones. Relying on this Court's precedents that have distinguished *Nyquist* on the basis of its footnote 38, the Ohio Supreme Court

rejected the argument that the program impermissibly linked government and religion, "because funds cannot reach a sectarian school unless the parents of a student decide, independently of the government, to send their child to that sectarian school." *Simmons-Harris*, 1999 Ohio LEXIS 1893, at *13-14.[14] The Court found that any link between government and religion is indirect, depending only on the "genuinely independent and private choices" of individual parents, who act for themselves, not for the government. *Id.* at *15 (quoting *Witters*, 474 U.S. at 487).[15]

B. THE MAINE DECISION DIRECTLY CONFLICTS WITH THE EIGHTH CIRCUIT'S DECISION IN *PETER V. WEDL.*

In addition to the Vermont, Wisconsin, Arizona, and Ohio Supreme Court establishment clause decisions discussed above, the Maine decision conflicts fundamentally with a decision of the Eighth Circuit Court of Appeals. In

---

[14] As in the Wisconsin program, the Ohio payment mechanism transmits checks made payable to the parents directly to the schools they select, and the parents then go to the school to endorse the checks. The Court explained that this mechanism ensures that the money will be spent on education. Direct tuition payments in the Maine program perform the same function.

[15] Although it rejected the establishment clause challenge to the program, the Ohio Supreme Court invalidated the program under the "single subject" provision of the Ohio Constitution. 1999 Ohio LEXIS 1893 at *17. The state legislature subsequently has reauthorized the program. See Thomas Suddes, "$17.2 Billion Spending Bill Passes: Voucher Program Included in Budget," *The Plain Dealer* (June 25, 1999) at 4B.

Peter v. Wedl, 155 F.3d 992 (1998), the Eighth Circuit struck down a governmental exclusion of parents choosing religious schools from benefits under a religiously-neutral educational assistance program. Minnesota law prohibited school districts from providing paraprofessional services to special education students onsite at private religious schools, while permitting them to be provided onsite to students enrolled in private nonreligious schools. Like Maine, Minnesota offered as its only justification for its religious discrimination the avoidance of an establishment clause violation.

Based upon this Court's decisions in *Zobrest* and *Agostini*, the Eighth Circuit held that provision of paraprofessional services onsite at the student's religious school would not have violated the establishment clause and that the denial of such services onsite violated the free exercise, free speech, and equal protection clauses of the U.S. Constitution, citing *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Native American Council of Tribes v. Solem*, 691 F.2d 382 (8th Cir. 1982), respectively. *Peter*, 155 F.3d at 996.

Several district courts also have considered the establishment clause issue in the context of special education. This Court has determined that under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, where school districts default on their obligation to provide a "free and appropriate public education" to a particular student, that student's family may enroll the student in a private school and receive reimbursement for the tuition and other costs involved. *School Comm. of Burlington v. Massachusetts Dep't of Educ.*, 471 U.S. 359

(1985). The question has arisen whether the establishment clause permits parents who choose religious schools in such situations to be reimbursed for the tuition they have paid to a religious school. Both of the district courts that have addressed this issue have held that the establishment clause is not violated because it is the parents who are selecting the schools even though the districts end up paying the tab. *Matthew J. v. Massachusetts Dep't of Educ.*, 989 F. Supp. 380 (D. Mass. 1998); *Christen G. v. Lower Merion Sch. Dist.*, 919 F. Supp. 793 (E.D. Pa. 1996).

All of these federal and state supreme court cases read this Court's establishment clause jurisprudence as containing a consistent theme: government programs may include religious options so long as they are the truly independent choice of the program's beneficiaries and the program contains no incentive to select a religious rather than a secular option. Maine's tuitioning system is the epitome of such a neutral, choice-driven system, and consequently the Maine Supreme Court and First Circuit decisions conflict with this Court's extensive post-*Nyquist* caselaw and the above-referenced cases that correctly apply it.

C. THE MAINE SUPREME COURT'S DECISION WOULD CUT A WIDE SWATH OF DESTRUCTION THROUGH FEDERAL AND STATE PROGRAMS.

In equating the transmission of tuition payments directly to the schools involved in the Maine program to the impermissible "subsidization" of religious schools,

the Maine Supreme Court creates a constitutional precedent that would invalidate the participation of religious institutions in a wide array of longstanding and vital federal and state programs, all of which allow the programs' beneficiaries to select a religious provider if they so desire, and all of which transmit federal or state dollars directly to the institutions in payment of services provided to the eligible beneficiaries.[16]

As is the case with Maine's tuitioning program, the purpose of those programs is not to subsidize the providers but rather to benefit the individuals entitled to receive the goods or services. The payments are made to

---

[16] These programs encompass federal student assistance programs, including Pell Grants (Basic Educational Opportunity Grants), 20 U.S.C. §§ 1070 *et seq.*; Supplemental Educational Opportunity Grants (SEOG's), 20 U.S.C. §§ 1070b *et seq.*; and Stafford Guaranteed Student Loans (GSL's), 20 U.S.C. §§ 1070a *et seq.*; federal medical assistance programs for the elderly, Medicare, 42 U.S.C. §§ 1395 *et seq.*; and Medicaid, 42 U.S.C. §§ 1396b *et seq.*; the federal Section 8 housing program, 42 U.S.C. §§ 1437f *et seq.*; the federal G.I. Bill, 38 U.S.C. §§ 1661 *et seq.*; and the federal school lunch program, 42 U.S.C. §§ 1751 *et seq.* In addition, there are numerous state assistance programs that are similarly structured. Many, if not all, states have their own student assistance programs for college students that are modeled on the Pell Grant program. See, e.g., Maine's Student Incentive Scholarship Program, 20-A M.R.S.A. §§ 11611 *et seq.* Although none of these federal and few of these state programs distinguish between religious providers and nonreligious providers, a few of the state student assistance programs do. See, e.g., Colo. Rev. Stat. § 23-3.5-102 (1998) (students attending pervasively sectarian colleges ineligible for Colorado Student Incentive Grant Program), and Wash. Rev. Code § 28B.10.814 (1994) (students pursuing theology degrees ineligible for state financial aid program).

the providers to ensure that the funds are used by the beneficiaries for the purposes for which they are given.

As the Ohio Supreme Court observed in *Simmons-Harris v. Goff*, the rationale behind transmitting funds directly to the schools enrolling scholarship recipients is to ensure that the funds are expended on education. *Simmons-Harris*, 1999 Ohio LEXIS 1893 at *2-3. Similarly, beneficiaries of Pell Grants, which are provided to low-income college students to assist them in defraying the costs of a college education, never see the grant money itself. That money is sent directly to the colleges the students select, where it is credited to their accounts. The concern, of course, is that if the money were sent directly to the student, it might never find its way to the school. A similar concern no doubt explains why the publication subsidies at issue in *Rosenberger* were sent to the publisher, rather than directly to the eligible student organizations. This mechanism ensures that those organizations actually use the funds for the purposes for which they are earmarked.

Consequently, these programs are structurally indistinguishable from the Maine tuitioning system. The beneficiaries choose where to obtain covered goods and services, and the agency administering the program pays the providers some or all of the cost of providing the service to the beneficiaries. Although the funds are transmitted directly to the providers, there is no question that aid is directed by the choice of private individuals and that it is for the benefit of the individuals on whose behalves the funds are paid. This is as true of a program like Ohio's, which sends checks to schools made payable to parents who must endorse the checks over to the

schools, as it is of Maine's program, where the checks are made out to the schools to be credited to the students' accounts.

In none of these structurally similar federal programs are there exclusions of religious providers. These programs, which can be characterized as beneficiary choice driven, are quite different in structure from other federal grant programs that provide funding to qualifying entities to carry out some programmatic purpose, such as the education program involved in *Bowen v. Kendrick*, 487 U.S. 589 (1988), or the institutional aid programs of *Tilton v. Richardson*, 403 U.S. 672 (1971), *Hunt v. McNair*, 413 U.S. 734 (1973), and *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976).[17] In such institutional aid cases, this Court to date generally has excluded pervasively religious institutions from the beneficiary class because to include them would constitute direct government aid to religion.[18] But if the view of the Maine Supreme Court were to prevail, religious providers would have to be excluded from the broad panoply of beneficiary-choice-driven programs as well.

This Court's precedents do not require public authorities to exclude individuals or groups from participation in religiously-neutral programs based upon the religious content of their choices. The First Amendment permits

---

[17] See also *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3755 (June 14, 1999).

[18] But even in that context, this Court has observed that "we have departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225.

governmental neutrality between believers and non-believers and between different groups of believers. In the absence of any need to avoid a violation of the establishment clause, Maine lacks any legitimate basis for interfering with families' ability to choose a religious education for their own children.

II. THE MAINE DECISION THREATENS EDUCATION REFORM EFFORTS ACROSS THE COUNTRY.

A. THE *BAGLEY* DECISION THREATENS STATE EFFORTS TO USE RELIGION-NEUTRAL CRITERIA IN PARENTAL CHOICE PROGRAMS.

Prior to the exclusion of religious school options in 1981, Maine's system exemplified a religiously-neutral school choice system, a model of how to design a constitutionally sound school choice program. Today, parental school choice, encompassing private schools among the range of educational options, presents a classic example of innovative policy experimentation at the state level that is a hallmark of our system of federalism. See *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). As previously described, Wisconsin and Ohio have enacted school choice programs that allow low-income youngsters in urban school districts to use a share of their public education funds in private nonsectarian and religious schools. Wis. Stat. § 119.23; Ohio Rev. Code Ann. § 3313.974-.979. And Arizona has enacted state income tax credits for contributions to private scholarship programs. Each of those programs has withstood legal challenge where opponents claimed such programs

violated the establishment clause. This year two more states have enacted new school choice initiatives. Florida has just instituted a program that allows children in failing public schools to attend other public schools or private schools (including religious schools) at state expense. Fla. Stat. ch. 229.0537. The day after the governor signed the bill into law, school choice opponents filed suit in state court challenging the program as violating the establishment clause and various provisions of the Florida Constitution.[19] Illinois recently has created a state income tax credit for educational expenses, which can include tuition expenses at private schools (including religious ones). 35 ILCS 5/201(m). As in Florida, opponents have challenged the constitutionality of the new law.[20] In addition, serious efforts to enact school choice programs occurred in a number of other states this past year, including Pennsylvania, New Mexico, and Texas.[21] Opponents of those efforts argue that the inclusion of religious choices is constitutionally impermissible, and despite the weight of authority, such concerns make it difficult for conscientious legislators to know what to do. The continuing vitality of this important educational reform necessitates a ruling by this Court that such

---

[19] *Holmes v. Bush*, No. 99-3370 (Fla. Cir. Ct, filed June 22, 1999)

[20] *Griffith v. Bower*, No. 99-CH-0049 (Ill. Cir. Ct., filed July 12, 1999)

[21] See Frank Reeves and Peter J. Shelly, "Ridge Fails on Vouchers," *Pittsburgh Post-Gazette* (June 18, 1999) at A1; R.A. Dyer, "Voucher Bill Killed Again in Legislature," Fort Worth Star-Telegram (June 6, 1999) at 1; Lois Fecteau, "Vouchers Fall Flat in Voting," *Albuquerque Journal* (May 10, 1999) at A1.

efforts are consistent with the neutrality mandate of the establishment clause.

B. THIS COURT'S REVIEW OF *MITCHELL V. HELMS* WILL NOT RESOLVE THE ISSUE OF RELIGION-NEUTRAL CRITERIA IN PARENTAL CHOICE PROGRAMS.

This Court's decision to review the Fifth Circuit Court of Appeals decision in *Mitchell v. Helms*, 151 F.3d 347 (1998), *cert. granted*, 67 U.S.L.W. 3756 (June 14, 1999), is unlikely to resolve the issues here. The federal program at issue in that case, Title VI of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. §§ 7301-7373, provides instructional materials and computers to public, private, and religious schools for use by eligible children. The program requires segregation of religious from nonreligious instruction, which may or may not be required in the context of such "direct" aid. Moreover, such segregation raises entanglement concerns that are not implicated here.

This is a simpler case, for as *Nyquist*'s author, Justice Powell subsequently observed, "[P]rograms that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* [403 U.S. 602 (1971)] test, because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at 491 (Powell, J., concurring).[22] Though simpler, the

---

[22] Justice Powell's concurrence in *Witters* was joined or approved by four other Justices. *Id.* at 490, 491 and 493.

question presented here is very important in the context of expanding desperately needed educational options. The conflicting jurisprudence among various state and federal courts on this important question necessitates resolution by this Court.

CONCLUSION

We urge this Court to grant the petition in this case and to resolve this constitutional question in favor of parental choice.

Respectfully submitted,

LINDA C. RUSSELL
PETRUCCELLI & MARTIN
50 Monument Square
P.O. Box 9733
Portland, Maine 04104-5033
(207) 775-0200

WILLIAM H. MELLOR
CLINT BOLICK*
RICHARD D. KOMER
MATTHEW B. BERRY
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 955-1300

Attorneys for Petitioners

**Counsel of Record*

APPENDIX A

Reporter of Decisions

MAINE SUPREME JUDICIAL COURT
Decision: 1999 ME 60
Docket: Cum-98-281
Argued: November 2, 1998
Decided: April 23, 1999

Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, and ALEXANDER, JJ.
Majority: WATHEN, C.J., and RUDMAN, DANA, SAUFLEY, and ALEXANDER, JJ.
Dissent: CLIFFORD, J.

ROBERT BAGLEY et al.

v.

RAYMOND SCHOOL DEPARTMENT et al.

SAUFLEY, J.

[¶1] We are called upon in this case to determine whether Maine's education tuition program, which explicitly excludes religious schools from receipt of state funds, violates any section of the United States or Maine Constitution. Because we conclude that it does not, we affirm the judgment of the Superior Court (Cumberland County, *Mills, J.*).

I. BACKGROUND

[¶2] The material facts are undisputed. Maine requires all school districts to provide education to its

residents from kindergarten through twelfth grade. *See* 20-A M.R.S.A. § 1001(8) (1993 & Supp. 1998). Those districts that do not have their own schools must provide tuition to resident families for use in other schools, through the State's education tuition program. Under the tuition program, students of parents residing in a school district which neither maintains a secondary school nor contracts for secondary school privileges may attend a school approved for tuition purposes. *See* 20-A M.R.S.A. § 5204(4). The school district must pay tuition for these students in the amount of the legal tuition rate, defined in chapter 219. *See id.*

[¶3] The tuition rate for each school is approximately equal to the sum of the school's allowable expenditures, divided by the number of students at a particular school, adjusted by certain factors, and capped by a statewide average per public secondary student cost. *See* 20-A M.R.S.A. §§ 5805, 5806. School districts have the option either to contract with one public school to take all of their students, pursuant to 20-A M.R.S.A. § 5204(3),[1] or pay tuition to public and approved private schools that accept students from that school district, pursuant to 20-A M.R.S.A. § 5204(4).[2] If the tuition program is used

---

[1] Section 5204(3) provides that "[s]tudents whose parents reside in a school administrative unit which contracts for school privileges under section 2701 may attend the contract school. The school administrative unit in which their parents reside shall pay the cost of the contract." 20-A M.R.S.A. § 5204(3).

[2] Section 5204(4) provides that:

> [s]econdary students whose parents reside in a unit which neither maintains a secondary school nor contracts for secondary school privileges may attend

by a district, the district pays tuition directly to a public school or to a private school that has accepted the child, has been selected by the child's parents, and has been approved for tuition purposes, pursuant to 20-A M.R.S.A. § 2951. *See* 20-A M.R.S.A. § 5810.

[¶4] Approximately half of the school districts in Maine satisfy their obligation by operating public elementary and secondary schools. The other half satisfy their obligation either wholly through Maine's tuition program, or by operating some schools, usually elementary, and paying tuition for students to attend only those schools which the school districts do not operate. Nearly 14,000 students attend public and approved private schools under the tuition program and approximately $70 million in public funds is expended each year by the Maine Department of Education and local school districts on tuition for students to attend these schools.

[¶5] Prior to 1981, parents were able to select religious schools for participation in Maine's tuition program. In 1981, however, the Legislature made religious schools ineligible for the program by amending the statute to provide that "[a] private secondary school may be

---

> a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country upon permission of officials of the receiving school. The school administrative unit where the students' parents reside shall pay tuition in the amount up to the legal tuition rate as defined in Chapter 219.

20-A M.R.S.A. § 5204(4).

approved for the receipt of public funds for tuition purposes *only if it . . . [i]s a nonsectarian school* in accordance with the First Amendment of the United States Constitution." 20-A M.R.S.A. § 2951(2) (emphasis added). The change was enacted in response to an Opinion of the Attorney General. *See* Op. Me. Att'y Gen. 80-2. That Opinion, solicited by the Senate Chair of the Legislature's Committee on Education, concluded that the inclusion of religious schools in Maine's tuition program violated the Establishment Clause of the United States Constitution. *See id.* The State does not dispute that its only justification for excluding religious schools from the tuition program was compliance with the Establishment Clause.

[¶6] The Raymond School District ("Raymond") does not have a high school and instead provides secondary education through Maine's tuition program. Most of the high school students in Raymond attend public school in Windham, Westbrook, and Gray-New Gloucester. Some, however, attend approved private schools, including North Yarmouth Academy, Hebron Academy, and Waynflete School.[3]

[¶7] Five families from the town of Raymond, Robert and Cynthia Bagley; Gary and Cynthia St. Pierre; Dennis and Patricia Cole; Ricky and Mary Thornton; and Jack and Stacie Fitch (referred to herein collectively as the "parents"), enrolled their sons at Cheverus High School, an all-male, private Roman Catholic college preparatory school, located in Portland and operated by the Society of

---

[3] In the 1997 school year, 31 of the Raymond middle school and high school aged children attended private schools.

Jesus, a religious order. There is no dispute that Cheverus High School is a religious school, specifically, a "pervasively sectarian school," educating its students in both secular and religious subjects.[4] Each of the boys attended public elementary school and, through the tuition program, public middle schools. None of the children attended Catholic schools during their primary education.

[¶8] The Coles, Thorntons, and Fitchs are either not Catholics or are not practicing Catholics, and all sent their sons to Cheverus High School primarily for academic and social reasons. The St. Pierres initially indicated that religion was a factor in their decision to send their son to Cheverus but later explained that the Cheverus hockey program and its academic reputation were the determining factors in their selection. The Bagleys, however, allege that religion was a principle motivation for choosing Cheverus, and Cynthia Bagley testified that it was her own "personal faith choice."

[¶9] After enrolling their sons, the parents requested that Raymond pay their sons' tuition at Cheverus. Raymond denied their requests, responding that "the Raymond School Department cannot pay tuition costs for sectarian schools," because they are not approved schools pursuant to 20-A M.R.S.A. § 2951(2). The parents filed this suit against Raymond, the Department of Education, and the Commissioner of Education, alleging that Raymond had violated their constitutional

---

[4] *Cf. Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998).

rights by refusing to pay tuition to the high school they selected for their sons.

[¶10] Without objection by the parents, a group of Raymond taxpayers and the Maine Civil Liberties Union intervened as defendants. Raymond then filed a motion to dismiss, which the trial court granted, holding that Raymond could not be liable under 42 U.S.C. § 1983 because the school district had no choice but to apply state law. Subsequently, the parents and the remaining defendants filed cross motions for summary judgment. After argument, the Superior Court granted the defendants' motions for summary judgment and denied the parents' motion for summary judgment, holding that 20-A M.R.S.A. § 2951(2) did not violate any of the constitutional provisions asserted by the parents.[5]

II. ANALYTICAL FRAMEWORK

[¶11] This appeal presents a unique question, requiring that we articulate with precision the issues before us. Unlike most recent cases addressing educational programs that provide state funding for religious

---

[5] The parents state their claims under both the state and the federal civil rights acts. *See* 5 M.R.S.A. §§ 4681-4685 (Supp. 1998); 42 U.S.C. § 1983 (1994). The Maine Civil Rights Act is inapplicable to the claims presented. It applies when there has been the use or threat of "physical force or violence" in an effort to interfere with the exercise of a constitutional right. 5 M.R.S.A. § 4681. No claim of violence, real or threatened has been presented by the parents. Accordingly, we do not reach the other issues raised by the State on this point.

schools,[6] we are not called upon to determine whether a particular program in which state funds benefit religious schools violates the Establishment Clause. Instead, we are presented with the opposite question: whether a tuition program that specifically excludes religious schools violates any of three constitutional provisions: the Establishment Clause of the First Amendment; the Free Exercise Clause of the First Amendment; or the Equal Protection Clause of the Fourteenth Amendment. These distinctions are critical to our analysis.

[¶12] Nationally, state legislatures have recently begun undertaking efforts to allow parents more flexibility and increased options in educational decisions through vouchers, tuition reimbursement programs, or tax relief programs.[7] Several of those programs allow participation by parents with children in religious

---

[6] *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Jackson v. Benson*, 578 N.W.2d 602, *cert. denied*, 119 S. Ct. 466 (1998); *Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352 (Vt. 1994); *Simmons-Harris v. Goff*, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio Ct. App. May 1, 1997).

[7] Commentators have noted the increased parental dissatisfaction with public schools. See, e.g. Michael A. Vaccari, *Public Purpose and the Public Funding of Sectarian Educational Institutions: A More Rational Approach After Rosenberger and Agostini*, 82 MARQ. L. REV. 1 (1998). "The overall success of the sectarian schools and the inadequacy of many public schools have given rise to a movement for parental choice in education. . . . In response to these realities, efforts to provide additional educational opportunities are being made throughout the country. . . . Public officials around the country are desperately seeking creative alternatives to provide increased educational opportunities in their communities." *Id.* at *7-9.

schools. Maine's tuition program does not allow such participation. Accordingly, our analysis is limited to whether either the Maine or federal constitution is violated when the State operates a tuition program that does not allow participation by religious schools.

[¶13] Addressing the constitutionality of the statute, the parties recognize that "[w]e have traditionally exercised great restraint when asked to interpret our state constitution to afford greater protections than those recognized under the federal constitution," *State v. Buzzell*, 617 A.2d 1016, 1018 n.4 (Me. 1992), and do not contend that the Maine Constitution affords greater protection than the United States Constitution. *See Blount v. Department of Educ. and Cultural Serv.*, 551 A.2d 1377, 1385 (Me. 1988); *School Admin. Dist. No. 1 v. Commissioner, Dept. of Educ.*, 659 A.2d 854, 857 (Me. 1995). We therefore address the parents' claims with the understanding that the rights guaranteed by the United States Constitution and the Maine Constitution are coextensive.[8]

---

[8] Many states have enacted constitutional provisions providing for stricter separation of church and state than that required by the Establishment Clause. *See* Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. FORUM ON CIVIL LIBERTIES & CIVIL RIGHTS 137, 181-82 (1998). Ironically, although Maine did not join those states, such provisions in state constitutions are often called "Blaine Amendments," referring to the efforts of James G. Blaine, who, after serving as Speaker of Maine's House of Representatives, rose to national prominence as a United States Representative, Senator, and Secretary of State.

The genesis of the Blaine Amendments began in the late 1800's resulting from a growing conflict between the supporters of public schools and the supporters of religious, often Catholic,

[¶14] Because we are asked to review the constitutionality of an act of the Legislature, we "begin with the

---

schools. *See* Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 22 HARV. J.L. & PUB. POL'Y 657, 668-72 (1998). In 1875, President Ulysses S. Grant advocated a "constitutional amendment that would deny public support to religious institutions." *Id.* at 670. At that time, the Supreme Court had not yet held that the First Amendment applied to the states through the Fourteenth Amendment. In response to Grant's request, Blaine, then a United States Senator, proposed an amendment to the United States Constitution which would have applied Free Exercise and Establishment Clause concepts to the states and would have directly prohibited the use of any state's public funds for the support of religious "sects." *See* William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALA. L. REV. 509, 526 (1998). The primary goal of the amendment was to prohibit any use of state funds to support religious institutions (frequently Catholic schools). At the same time, the reading of the King James (Protestant) version of the Bible was an accepted practice in "public" schools. *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, *5 (1997); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the NonEstablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1147-49 (1995). The House of Representatives passed the amendment, but it was narrowly defeated in the Senate and was never enacted in the U.S. Constitution.

Although the Blaine Amendment failed, it had a significant impact nationally, sparking similar efforts at the state level to prohibit the use of any state funds to support religious education. *See* Kemerer, *supra* at 154-57. The result was that several states amended their constitutions to include a "Blaine Amendment," strictly prohibiting the use of public money for the support of religious institutions. It is also thought that the concepts embodied in the Blaine Amendments were incorporated into the fabric of the First Amendment's Establishment Clause through Supreme Court jurisprudence

basic principle of statutory construction that 'this Court is bound to avoid an unconstitutional construction of a statute if a reasonable interpretation of the statute would satisfy constitutional requirements.' " *State v. Cropley*, 544 A.2d 302, 304 (Me. 1988) (quoting *Bossie v. State*, 488 A.2d 477, 479 (1985)). We are also mindful, however, of the unique status of a judicial inquiry into the interpretation of the First Amendment. Where such fundamental rights as those expressed in the First Amendment are at stake, we must examine the issues independently, and we will not limit our inquiry by the constraints of the often relied on deference to legislative findings. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

[¶15] Our analysis is made in three parts. First, we will determine whether the tuition statute violates the Free Exercise Clause of the First Amendment. Next, we will determine whether the statute as it now exists violates the Establishment Clause of the First Amendment. Finally, we will consider whether the explicit exclusion of religious schools from the tuition program violates the Equal Protection Clause of the Fourteenth Amendment. Because the only basis asserted by the State for its disparate treatment of religious schools is its understanding that the statute in existence prior to the exclusion violated the Establishment Clause, in undertaking the Equal Protection analysis, we will review in greater detail the recent changes in Establishment Clause jurisprudence.

---

during the early nineteen hundreds. *See, e.g.*, Viteritti, *supra* at 670-76.

III. FREE EXERCISE CLAUSE

[¶16] The parents first contend that Maine's tuition program violates the Free Exercise Clause by burdening their fundamental right to send their children to religious schools. *See Meyer v. Nebraska*, 262 U.S. 390 (1923). The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . *prohibiting the free exercise [of religion]*. . . . " U.S. Const. amend., I (emphasis added)[9]. "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). The party challenging a statute on free exercise grounds must "initially demonstrate: (1) that the activity burdened by the regulation is motivated by a sincerely held religious belief; and (2) that the challenged regulation restrains the free exercise of that religious belief." *Blount v. Department of Educ. and Cultural Servs.*, 551 A.2d at 1379. If the challenger meets that initial burden, "the burden shifts and the State can prevail only by proving both: (3) that the challenged regulation is motivated by a compelling public interest; and (4) that no less restrictive means can adequately achieve that compelling public interest."[10] *Id.*

---

[9] The Free Exercise Clause is made applicable to the states by the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

[10] Recently the Supreme Court signalled a departure from reliance on the "substantial burden" test. *See Employment Div., Dep't. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (the Free Exercise Clause does not prohibit application of Oregon drug laws to religious ingestion of peyote). *Smith* has

[¶17] The defendants first assert that the parents have failed to generate a genuine issue of material fact in support of their claim that sending their children to Catholic high school constitutes an exercise of religious practice or belief. To preclude a summary judgment on this point, the parents must present some fact tending to prove that attending Catholic school is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). Of the parties filing suit, only the Bagleys contend that religion was the motivation for sending their son to Catholic school, and there is limited evidence in the record demonstrating that obtaining a Catholic education for the Bagleys' son is central to their religious beliefs.[11]

---

been held to "establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (a city ordinance dealing with ritual slaughter of animals was not of general applicability and violated the Free Exercise Clause). This change in Free Exercise jurisprudence, however, has not altered the requirement that a law that is not "neutral" and "of general applicability" must be justified by a compelling government interest if it impairs the exercise of religious beliefs. *See id.* at 531-32. Neither *Smith* nor *Hialeah* are applicable to the matter at bar because the statute at issue is not neutral on its face.

[11] The trial court declined to allow the defendants to augment the record with a statement that Mrs. Bagley made to the media in which she indicated that "this is not about religion. This is about my son getting the best education possible." At

[¶18] We recognize that courts should be hesitant to delve into the asserted "centrality" of a religious practice, and we would do so only with great caution.[12] Here, however, we are not called upon to undertake that analysis. Assuming *arguendo* that the parents have raised disputes of fact regarding matters central to their religious beliefs, we could not find that any substantial burden has been imposed on the free exercise of those

---

best, the admission of that statement would have added to the dispute regarding the issue of religious choice. Although Mrs. Bagley does not explicitly assert that the choice of educational placement was "central" to her religion, she did aver that one of her reasons for sending her son to Cheverus was "I am Catholic, and we are raising our children as Catholics. We have always wanted to send our kids to Catholic schools because we have a duty to teach them about their faith." In contrast, none of the other parents assert specific religious reasons for sending their sons to Cheverus and none of the children attended Catholic schools during the ages that Raymond offered a free public education. Only when the parents reached the point of choosing an appropriate high school did they turn to a religious institution. All of the parents candidly admit that they are seeking to obtain the best education for their children.

[12] In *Smith*, the Supreme Court advised caution regarding judicial determinations of the centrality of a religious belief in connection with the "substantial burden" test.

> What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? . . . It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds . . . . If the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded.

Smith, 494 U.S. at 887-88 (citations omitted).

beliefs. "It is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.' " *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)). The concurring opinion of Justice Douglas in *Sherbert v. Verner*, 374 U.S. 398 (1963) best articulates this concept.

> The fact that government cannot exact from [a citizen] a surrender of one iota of [her] religious scruples does not, of course, mean that [she] can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.[13]

Id. at 412 (Douglas, J., concurring). Section 2591(2) does not prevent the parents from sending their sons to Cheverus. While they will not receive tuition assistance if

---

[13] *See also Brusca v. Missouri*, 332 F. Supp. 275, 279 (E.D. Mo. 1971) (quoting with approval Justice Douglas's concurrence in *Sherbert*); *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 390 (1990) (holding that a collection of sales and use taxes applicable to religious materials did not violate organization's free exercise); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood*, 699 F.2d 303, 306 (6th Cir. 1983) (holding that "[i]nconvenient economic burdens on religious freedom do not rise to a constitutionally impermissible infringement of free exercise"). *See also Strout v. Commissioner, Maine Dep't of Educ.*, 13 F. Supp.2d 112, 114 (D. Me. 1998) (holding that no right exists to require taxpayers to subsidize parents' choice to send their children to religious school).

they choose to do so, they are no more impaired in their efforts to seek a religious education for their sons than are parents of children in school districts that provide only a free nonreligious education in public schools.

[¶19] In sum, the Free Exercise Clause is "designed to prevent the government from impermissibly burdening an individual's free exercise of religion, not to allow an individual to exact special treatment from the government." *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 702 (10th Cir. 1998) (citing *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1353 (10th Cir. 1997)); *Braunfeld*, 366 U.S. at 605 (a statute that makes adherence to religious beliefs "more expensive" does not burden free exercise); *McCarthy v. Hornbeck*, 590 F. Supp. 936, 945-46 (D. Md. 1984) (Free Exercise Clause does not mandate that the State subsidize a person's constitutional right to send their children to church-related schools).

[¶20] Because we conclude that the parents have failed to generate a material fact upon which a factfinder could conclude that section 2951(2) places a substantial burden on the free exercise of their religion, we conclude that the exclusion of religious schools from the tuition program does not violate the Free Exercise Clause of the First Amendment.

IV. ESTABLISHMENT CLAUSE

[¶21] The parents next contend that the exclusion of religious schools from Maine's tuition program violates

the Establishment Clause.[14] Their reliance on the Establishment Clause in this context is misplaced. The purpose of the Establishment Clause is reflected in the often repeated words of Thomas Jefferson: to build "a wall of separation between Church and State." Letter from Thomas Jefferson Replying to Public Address from Committee of the Danbury Baptist Assn. of Connecticut (Jan. 1, 1802) *in* 3 THE WRITINGS OF THOMAS JEFFERSON 8-9 (H.A. Washington ed., 1861); *see also Reynolds v. United States*, 98 U.S. 145, 164 (1878). The dual concepts of the First Amendment's references to religion are meant to address opposite concerns. The Free Exercise Clause addresses the "negative," it prevents the government from interfering with religious practice, while the Establishment Clause addresses the "affirmative," it prevents the government from sponsoring or establishing a religion. *See Watson v. Jones*, 80 U.S. 679, 730 (1871) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.").

[22] Distilled to its essence, the Establishment Clause prohibits the government from supporting or advancing religion and from forcing religion, even in

---

[14] The Establishment Clause is made applicable to the states by the Fourteenth Amendment. *See Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947) (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)). *See also Maine Human Rights Com'n v. Local 1361, United, Etc.*, 383 A.2d 369, 377, n.19 (1978).

subtle ways, on those who choose not to accept it.[15] It has no role in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion. Accordingly, we find no support for the proposition that the Establishment Clause prevents a state from refusing to fund religious schools. Having similarly found that no violation of the Free Exercise Clause of the First Amendment has been demonstrated, we conclude that any constitutional deprivation caused by 20-A M.R.S.A. § 2951(2) must arise, if at all, under the Equal Protection provisions of the Fourteenth Amendment.

---

[15] The Supreme Court has written that

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from [sic] they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Everson v. Board of Educ., 330 U.S. at 15-16.

IV. EQUAL PROTECTION

A. The Underpinnings of Equal Protection Concepts

[¶23] The parents finally contend that 20-A M.R.S.A. § 2951(2) violates the Equal Protection Clause of the Fourteenth Amendment which forbids any state from denying "to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1, and thereby requires that all persons similarly situated must be treated alike. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982).

[¶24] The parents present a somewhat unusual Equal Protection argument. They do not assert that, based on their religion, they have been denied access to education for their children that is available to others.[16] Indeed, the parents have the right to tuition payments for the same range of schools available to all parents in Raymond and have a broader range of options available to them than parents in towns with a public high school. Rather, the parents assert that because they would choose a school that is not approved for the tuition program, and because that school is excluded due to its religious nature, they have been denied equal protection of the laws based on "religion."

[¶25] The difficulty in framing the parents' contention as an Equal Protection claim is highlighted by their concession that the State is not required, in towns that have public high schools, to pay for a high school education at a religious school. They further concede that if the State were to provide tuition in towns such as Raymond

---

[16] *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

only for other public schools, they would have no cause of action. Their argument turns therefore on the fact that the State chooses to include private schools in the tuition program but excludes private religious schools. In essence, the parents claim that Cheverus is treated differently because it is a religious school, not that the parents are treated differently because they are Catholic. Ordinarily, the Equal Protection claim here would be asserted, not by potential clients of the excluded institution, but by the school itself.[17] Cheverus, however, is not a party to this action.

[¶26] Nonetheless, we conclude that the parents present an important issue worthy of evaluation. For purposes of this analysis, therefore, we will assess the parents' Equal Protection argument assuming *arguendo* that the parents' lack of opportunity to have the State pay the tuition for their children to attend a private religious school results in *their own* disparate treatment on the basis of their religion.

B. The Level of Scrutiny

[¶27] Because the parents assert that they have been denied the equal protection of the laws, we must first address the level of scrutiny to be given to the State's action. "If a challenged statute infringes a fundamental constitutional right or involves an inherently suspect classification such as *race or religion*, it is subject to analysis under the strict scrutiny standard." *School Admin.*

---

[17] *See, e.g., Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998).

Dist. No. 1 v. Commissioner, Dep't of Educ., 659 A.2d 854, 857 (Me. 1995) (emphasis added). Strict scrutiny requires that the challenged action be narrowly tailored to achieve a compelling governmental interest. *See Butler v. Supreme Judicial Court*, 611 A.2d 987, 992 (Me. 1992).

[¶28] In contrast, if a challenged statute does not involve either a fundamental right or a suspect class, "different treatment accorded to similarly situated persons need only be rationally related to a legitimate state interest." *School Admin. Dist. No. 1*, 659 A.2d at 857. When a statute is reviewed under the rational basis standard, it bears a strong presumption of validity. *See id.*

[¶29] The tuition statute, 22-A M.R.S.A. § 2951(2), explicitly excludes only those private schools with religious affiliations. As the Supreme Court has stated "[j]ust as we subject to the most exacting scrutiny laws that make classifications based upon race . . . so too we strictly scrutinize governmental classifications based on religion." *Employment Div. Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 886 n.3 (1990) (citations omitted).

[¶30] Notwithstanding the obvious disparate treatment of religious schools under Maine's tuition statute, the defendants advocate the use of the rational basis standard. The defendants first contend that we must view Equal Protection claims, when accompanied with a Free Exercise claim, as a "reprise" of the Free Exercise argument. *See Blount v. Department of Educ. and Cultural Servs.*, 551 A.2d 1377, 1385-86 (Me. 1988) (holding that the State's prior approval of educational choices for children, including home-schooling, did not violate Free Exercise

or Equal Protection). Reliance on *Blount*, however, is misplaced. In *Blount*, we characterized the Equal Protection claim as a "reprise" of the Free Exercise claim because, based on the facts, review of the Equal Protection claim dictated rational basis scrutiny. The statute "[h]aving already survived strict scrutiny under the First Amendment" could readily pass rational basis scrutiny. *See id.* Here, however, we do not reach an analysis of the statute under the Free Exercise compelling interest standard. Thus, an Equal Protection analysis is not redundant. Furthermore, nothing we stated in *Blount* eliminated the possibility that, in some circumstances, Equal Protection may provide more protection than the Free Exercise Clause. *Blount* is therefore not applicable to the present scenario.

[¶31] Second, the defendants contend that there is no basis for an Equal Protection challenge based upon school funding. Here they rely on *Norwood v. Harrison*, 413 U.S. 455 (1973), where the Court addressed such a challenge in another context.

> It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

Id. at 462.[18] The general proposition set forth in *Norwood*, however, does not reach the more narrow question

---

[18] Additionally, the Maine Constitution only requires that "the legislature are authorized, and it shall be their duty to

presented in the matter before us. The question is not whether the State must support religious schools in general. The question is whether, having decided to create a tuition program that allows parents to choose private schools, the State may exclude private religious schools from receipt of state funds.

[¶32] Thus, the defendants' contention that rational basis scrutiny applies is incorrect. Ultimately, however, the debate over the level of scrutiny is purely academic. The State offers only one justification for the statute – an effort to comply with the Establishment Clause. Accordingly, it makes little difference whether we classify the level of scrutiny as strict or requiring only a rational basis. If the State's justification is based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level of scrutiny.

C. Application of the Establishment Clause to the Tuition Program

[¶33] Because classification on the basis of religion is distinct as the only classification which carries with it a converse prohibition against government involvement or entanglement, we must address the balance between the competing constitutional mandates of the First and Fourteenth Amendments. If the exclusion of religious schools is not required by the Establishment Clause of the First Amendment, it must be struck down because the State

---

require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools. . . . " Me. Const. art. VIII, pt. 1, § 1.

offers no other reason for its existence. If the exclusion is required in order to comply with the Establishment Clause, the State will have presented a compelling justification for the disparate treatment of religious schools, and the parents' Equal Protection claim will fail. *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (agreeing that compliance with constitutional obligations "may be characterized as compelling.")

1. Development of Establishment Clause Jurisprudence

[¶34] We look first to the history of the religious exclusion contained in 20-A M.R.S.A. § 2951(2) and the reason for its enactment. Prior to 1981, religious schools were treated no differently than any other private school under Maine's tuition program. In response to concerns about payment of state funds to religious schools, the Legislature sought and received an Opinion of the Attorney General. That opinion concluded that the provision allowing payments to religious schools violated the Establishment Clause. *See* Op. Me. Att'y Gen. 80-2. The ensuing enactment of the religious exclusion brought about significant changes in at least one religious school that had relied extensively on state tuition funds for operation.[19]

---

[19] One of Maine's four Roman Catholic high schools, John Bapst High School, in Bangor, closed as a result of being excluded from the education tuition program. *See Bangor Catholic School to Shut Down*, PORTLAND PRESS HERALD, April 30, 1980, at 13. When the Attorney General released his opinion, "124 of Bapst's 308 students were receiving state tuition

[¶35] The Legislature enacted the exclusion in 1981 in direct response to developments in Establishment Clause jurisprudence during the 1970's. Placing those developments in a historical context demonstrates that the Legislature had little choice but to adopt the exclusion if it chose to continue its tuition program.

[¶36] The Supreme Court's evolving treatment of the Establishment Clause has been a study in the changing forces of our society. Although much has been written by eminent scholars on the intertwining of church and state through the decades, our understanding of current decisional doctrine in this mutable area best begins with *Everson v. Board of Educ.*, 330 U.S. 1 (1947). There, a New Jersey statute authorized reimbursement to parents for the expenses of transporting children to school on public busses, including parents of children riding the busses to religious schools. *See id.* at 4-5. The Supreme Court found no violation of the Establishment Clause. Writing for the Court, Justice Black wrote that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here." *Id.* at 18. Accordingly, the Court refused to strike down programs that provided transportation to religious as well as nonsecular schools.

[¶37] Everson was followed twenty years later by *Board of Educ. v. Allen*, 392 U.S. 236 (1968). In *Allen*, the Court similarly upheld a New York statute requiring local

---

subsidies." David Himmelstein, *Only $2 Million Miracle Could Keep Bapst Going*, MAINE SUNDAY TELEGRAM, May 4, 1980, at A14.

public school authorities to lend textbooks free of charge to all students in grades 7 through 12, including students attending religious schools. *See id.* at 238. The Court found that the books were provided to further educational opportunities for children and only benefitted the parents of children in religious schools and not the religious schools themselves because the books technically were owned by the State. *See id.* at 243-44.

[¶38] Beginning in the early 1970's, however, the Court evidenced a significant shift in its focus, from the public purpose of the program under scrutiny, to the possible benefits to the religious institutions at issue. In 1971, the Court acknowledged the difficulties it had encountered in attempting to delineate the point at which a seemingly neutral program crosses the line into a violation of the Establishment Clause: "[c]andor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). To bring greater clarity to that demarcation, the Court announced a three-part test which would assist courts in drawing lines to protect against "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activities.' " *Id.* (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)).

[¶39] The "Lemon Test" comprises a three-pronged analysis, "gleaned" from prior cases, requiring that: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . and finally,

the statute must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-13 (citations omitted). Any statute that ran afoul of any one of those tenets would be held to violate the Establishment Clause.

[¶40] In several cases following *Lemon*, the Court struck down, in whole or in part, state programs designed to assist parents with educational costs where the programs at issue allowed that assistance to benefit religious schools. During this period, the Court invalidated New York tax laws that provided direct money grants to qualifying nonpublic schools for maintenance and repair of facilities and equipment; a tuition reimbursement plan for parents of children attending nonpublic schools; and tax relief to parents failing to qualify for tuition reimbursement. *See Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). It then struck down a Pennsylvania law that provided for loans of educational materials and equipment directly to religious schools, *see Meek v. Pittenger*, 421 U.S. 349 (1975), and invalidated a program that placed public school teachers in religious school classrooms for certain classes, *see School Dist. v. Ball*, 473 U.S. 373 (1985).

[¶41] In his opinion regarding the constitutionality of the tuition program, the Attorney General relied heavily on *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) in determining that including religious schools in the tuition system violated the Establishment Clause. The *Nyquist* Court found that although the programs had secular purposes in protecting the health and safety of private school students, they failed the "effect" prong of the *Lemon* test because the vast majority of the money went to religious institutions. *See*

id. at 775-83.[20] The Court also held that "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that *direct aid in whatever form is invalid.*" *Id.* at 780 (emphasis added). Furthermore, the Court concluded that the result was the same whether the funds were channeled to the parents or paid directly to the schools.[21] *See id.* at 785-88.

[¶42] Application of the concepts set forth in *Nyquist* led to the inevitable conclusion that Maine's all encompassing tuition program violated the Establishment Clause. Before the enactment of the exclusion, the tuition program required school administrative districts to pay tuition directly to the private school – precisely the "direct aid" prohibited by *Nyquist*. If the tuition was not paid by the district within 30 days of the billing date, the

---

[20] In both *Allen* and *Everson*, the benefit conferred upon the religious school by the state statute was indirect. By providing funding for school books and transportation, the state marginally decreased the cost to parents of children attending religious schools. At no point would state revenue flow from the state coffers into the hands of religious schools.

[21] The Court stated that:

> [I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.

Id. at 786.

State paid the bill and deducted that amount from the state school subsidy to the school administrative unit owing tuition. *See* 20-A M.R.S.A. § 5810(2). There were no safeguards within Maine's system to ensure that state funding was only used for secular purposes. The amount of the tuition was intended to cover the average per-student cost, which could include expenses for religious classes, religious studies, and religious events. *See* 20-A M.R.S.A. § 5805(1). The tuition was paid in a lump sum directly to the religious school of a parent's choice. Thus, the State's tuition system, as written prior to the 1981 amendment, would have been found in violation of the Establishment Clause.

2. Changes in Establishment Clause Jurisprudence Since 1981

[¶43] The parents urge us to conclude, however, that recent changes in the Supreme Court's analysis of the Establishment Clause have resulted in the elimination of the necessity for the religious exclusion. There is no question that, between 1981 and the present, the "lines of demarcation" in Establishment Clause analysis have shifted once again.[22]

---

[22] The transition in Supreme Court philosophy was not smooth. In the 1980's, the Court wavered between a strict and a broad interpretation of the Establishment Clause. In *School Dist. v. Ball*, 473 U.S. 373 (1985), the Court held that programs in which classes for nonpublic school students are financed by the public school system, taught by public school teachers, and conducted in "leased" classrooms in the nonpublic schools violated the Establishment Clause. The Court, focusing on the

[¶44] The changes can be seen both in the tools used by the Court to analyze alleged Establishment Clause violations and in the nature of governmental involvement in religious schools that the Court has become willing to tolerate.

[¶45] We first examine the changes in the analytical tool utilized by the Supreme Court in these cases. The *Lemon* Test, announced in 1971, was applied to all school cases in the 1980's. The application of the *Lemon* Test, however, has been fluid at best. In *Nyquist*, the Court held that "there is no single constitutional caliper" for determining whether a state action violates the Establishment Clause and that tests such as those announced in *Lemon* should be "viewed as guidelines." 413 U.S. at 773 n.31 (citations omitted). In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court found the Lemon test to be "no more than a helpful signpost." *Id.* at 394 (citations omitted). And in *Lynch v. Donnelly*, 465 U.S. 668 (1984), it noted that the Lemon Test has never been binding on the Supreme Court. *See id.* at 679.

---

statute's "effect," held that "there is a substantial risk that, overtly or subtly, the religious message [the teachers] are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school." *Id.* at 387. And in *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Supreme Court held that an Alabama statute authorizing public school teachers to hold a one-minute moment of silence for "meditation or voluntary prayer" violated the Establishment Clause. *See id.* at 56-62. The Court held, for the first time, that the statute violated the first prong of the Lemon Test, no secular purpose, because the sponsor of the bill specifically stated that the purpose of the law was an "effort to return voluntary prayer" to the public schools. *Id.* at 56-57.

[¶46] Most recently, in *Agostini v. Felton*, 521 U.S. 203 (1997), the Court acknowledged the continuing efficacy of a *Lemon*-like analysis but suggested that the effect and entanglement prongs must be seen as parts of a unitary consideration. As one court noted, "[t]he court essentially collapsed the Lemon Test so that the focus is on whether the challenged activity has the effect of advancing religion." *Porta v. Klagholz*, 19 F.Supp.2d 290, 297 (D.N.J. 1998).

[¶47] We turn then to the recent decisions in which the Supreme Court has reviewed other school aid programs for Establishment Clause compliance. Two decisions bookend those changes: *Mueller v. Allen*, 463 U.S. 388 (1983) and *Agostini v. Felton*, 521 U.S. 203. In *Mueller*, the Court upheld a Minnesota law allowing taxpayers, in computing their state income tax, to deduct expenses incurred in providing for the education of their children, including tuition, transportation, and textbooks, without regard to the secular or religious nature of the school at issue. *See* 463 U.S. at 390. The Court accepted the State's secular purpose, stating that "governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the Lemon framework." *Id.* at 394. The *Mueller* Court distinguished *Nyquist* and relied upon several factors in finding no impermissible effect of advancing religions: the tax deduction is one of several available under Minnesota law; the deduction is available for only educational expenses, not for religious expenses; the tax is available to all parents; and the aid is a benefit to and is channeled through individual parents, not the schools. *See id.* at 396-99. The Court held that "[t]he historical purposes of

the [Establishment] [C]lause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400.

[¶48] In the decade and a half that followed *Mueller*, the Court inched further away from its more restrictive line-drawing. In *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), the Court again acknowledged that direct cash subsidies to a religious school would not be approved, but held that "the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution." *Id.* at 486. It determined that a single grant of aid to a blind college student for his training to become a pastor did not violate the Clause, noting that no other person had ever sought to use state grant money for that purpose and that the grant monies were provided directly to the student, not to the religious college. *See id.* at 488. Then in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), the Court determined that allowing a school district to provide a sign-language interpreter to accompany a student to his classes at a Catholic High School did not violate the Establishment Clause. Distinguishing those facts from cases involving direct cash subsidies to religious schools, the Court noted that "no funds traceable to the government ever find their way into sectarian schools' coffers." *Id.* at 10.

[¶49] Finally, in *Agostini*, the Court explicitly overruled a prior decision in which it had concluded that the Establishment Clause prevented public school teachers from assisting underprivileged children in religious

schools. *See Aguilar v. Felton*, 473 U.S. 402 (1985).[23] The change in approach resulted from two significant modifications in Supreme Court analysis announced in cases subsequent to *Aguilar*. *See Agostini*, 521 U.S. at 223-25. First, the Court abandoned any notion that placing "public employees on parochial grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.* at 223. Second, the Court departed from the rule that "all government aid that directly aids the educational functions of religious schools is invalid." *Id.* at 225.

[¶50] Writing for the Court, Justice O'Connor concluded in *Agostini* that recent Establishment Clause cases had undermined some of the assumptions on which cases decided over the preceding decade had been built, but concluded nonetheless that the general principles used to

---

[23] The decision in *Aguilar* resulted from the efforts of the City of New York to provide remedial education to disadvantaged children attending private schools. In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965 to provide funds to local educational agencies for education, guidance, and job counseling to eligible students. *See* 20 U.S.C. § 6301 *et seq.* (1994). Although the services may be provided to children in private schools, there are numerous constraints not applicable when it provides aid to public schools. In an effort to provide these services to children in private school, the city first tried bussing the students from private to public school. When this attempt proved unsuccessful, the city sent the teachers into the private schools. The Supreme Court, in *Aguilar*, held that the Establishment Clause barred the City of New York from sending public school teachers into religious schools to provide remedial education to disadvantaged children. *See* 473 U.S. at 414; *Agostini*, 521 U.S. at 208-14.

evaluate alleged Establishment Clause violations remain valid: "we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. . . . Likewise we continue to explore whether the aid has the 'effect' of advancing or inhibiting religion." *Id.* at 222-23. The Court then took pains to identify the limits of its holding, emphasizing that no money flowed to the religious school and that the services of the public employee did not supplant the school's ordinary educational functions or relieve it of costs it would otherwise have borne in the student's education. *See id.* at 223-31.

3. School Aid Programs in Other States

[¶51] In recognition of the changes in the Supreme Court's Establishment Clause jurisprudence, several states have enacted statutes aimed at providing financial assistance to parents of students attending religiously affiliated schools. For example, in 1997, an intermediate appellate court in Ohio upheld a statute that provided need-based scholarships to students in Cleveland that may be used in public or private schools. *See Simmons-Harris v. Goff*, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio Ct. App., May 1, 1997).[24] The Pilot

---

[24] Scholarship recipients receive a fixed percentage of the private school tuition, up to a maximum of $2,500. "Recipients whose family income is not more than two hundred percent of the federally established poverty level receive ninety percent of their school tuition, while recipients whose family income is above this 'low income' threshold receive seventy-five percent of their school tuition." *Id.*

Scholarship Program was enacted in response to an educational crisis in the Cleveland City School District so severe that the State was ordered by a federal court to take over administration of the district. *See id.* at *1. The scholarship program was drafted so that the money does not flow directly from the State to religiously affiliated schools. Where a scholarship recipient chooses a public school, the State issues a check payable directly to the school. Where the scholarship recipient has chosen a private school, however, the State delivers a check, made payable to the parents, who must endorse the check to the school. *See id.* An appeal of that decision is pending before the Ohio Supreme Court.

[¶52] In 1998, the Wisconsin Supreme Court upheld a statute permitting sectarian schools to participate in the Milwaukee parental school choice program. *See Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S.Ct. 466 (1998). The program, enacted to enable economically disadvantaged children in Milwaukee to attend private schools, authorized the State to issue tuition vouchers to approved private schools, both sectarian and nonsectarian, in the name of parents of students attending the school.[25] *See id.* at 608-09. In order for the school to obtain state funding, the voucher must then be endorsed to the school by the parent whose name appears on the voucher.

---

[25] In order to qualify for participation in the program the student must be "a member of a family that has a total family income that does not exceed an amount equal to 1.75 times the poverty level determined in accordance with criteria established by the director of the federal office of management and budget." WIS. STAT. § 119.23(2)(1) (1998).

See id. at 608-09.[26] The Supreme Court declined a petition for *certiorari* in this matter.[27]

---

[26] Before the enactment of the statute allowing religious schools to participate in the program, the Wisconsin voucher program was challenged on grounds identical to those before us today. *See Miller v. Benson*, 878 F.Supp. 1209 (E.D. Wis. 1995). The federal district court upheld the exclusion of religious schools: "The present state of First Amendment law compels this court to hold that the plaintiffs' request to expand the current Choice Program to make tuition reimbursements directly payable to religious private schools who admit eligible Choice Program schoolchildren would violate the Establishment Clause. The current Program is constitutional." *Id.* at 1216. On appeal, the Seventh Circuit determined that, because the Wisconsin Legislature had recently removed the portion of the statute eliminating religious schools from the tuition program, the issue was moot. *See Miller v. Benson*, 68 F.3d 163 (7th Cir.1995).

[27] Prior to 1996, Vermont utilized a school-choice program, similar to the Wisconsin system, whereby students living in participating districts could attend approved public or private high schools, including religiously affiliated schools. *See* 16 V.S.A. § 822(a)(1). The constitutionality of that statute withstood a limited challenge in 1994. *See Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352, 358 (Vt. 1994). ("Recognizing that direct payments to a sectarian institution may raise additional considerations, *we do not address the validity of a direct payment to a sectarian institution.*") (Emphasis added.) The statute's current validity, however, is in question. In 1996, the State's department of education terminated all general state aid to a school district because it approved the use of public funds to pay the tuition of fifteen students attending a religiously affiliated school, declaring the payment unconstitutional. The school board disagreed and filed an action in state court. In July of 1997, the trial court upheld the education department's decision. *See Chittenden Town Sch. Dist. v. Department of Educ.*, No. SO478-96 (Vt. Rutland Cty. Super. Ct. June 27, 1997). The trial court's decision is currently under appeal.

[¶53] Very recently, the Arizona Supreme Court upheld a state tax credit, of up to $500, equal to the amount individuals donate to school tuition organizations.[28] *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999). The Court upheld the statute against a claim of an Establishment Clause violation, holding that "[p]rivate and sectarian schools are at best only incidental beneficiaries of this tax credit, a neutral result that we believe is attenuated enough to satisfy Mueller and the most recent Establishment Clause decisions." *Id.* at 616 (citations omitted).

[¶54] Although the recent efforts of Arizona, Ohio, Vermont, and Wisconsin provide a backdrop for our analysis, they do not provide persuasive authority for interpretation of the Establishment Clause. The Supreme Court has not yet reviewed any of these programs, and it is not clear which of them, if any, would be found to pass muster under an Establishment Clause analysis. Moreover, although the efforts of other states demonstrate that the Supreme Court's changing attitude in Establishment Clause jurisprudence has encouraged other state legislatures to create new programs offering financial assistance to parents of students attending religiously affiliated schools, none speaks to the issue before us today.

---

[28] School tuition organizations are charitable organizations that allocate at least 90 percent of their annual revenue for educational scholarships or tuition grants. *See* A.R.S. 43-1089 (1997).

4. The Maine Tuition Program Today

[¶55] Nonetheless, pointing to the efforts undertaken by a few other state legislatures to include religious schools in various school aid programs, the parents urge us to conclude that Maine's tuition program can no longer withstand a constitutional challenge because it continues to exclude religious schools. Maine's tuition program has not changed in any substantive manner since the exclusion was enacted in 1981. The program still provides direct tuition payment to the school of the parents' choice. With the exception of certain certification requirements, it does not place any restrictions or limitations on the use of the funds or the content of the course offerings. It therefore continues to provide for a payment of a substantial amount of money directly to the schools participating in the program.

[¶56] A careful review of the teachings of *Mueller, Zobrest, Witters* and *Agostini*, leads us to conclude that, notwithstanding the shifts in Establishment Clause jurisprudence since the enactment of the religious school exclusion, in the absence of that exclusion, Maine's tuition program would violate the Establishment Clause.

[¶57] We undertake this analysis within the framework utilized by the *Agostini* Court, asking first whether the statute has a "secular legislative purpose." We conclude, as have most other courts addressing similar questions, that the education of the State's children is of such paramount importance that it provides a valid secular reason for state expenditures. *See, e.g., Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. at 773. Indeed, there are few other governmental pursuits that

involve such important public policy considerations and such an extensive history of governmental involvement. We conclude therefore, "[a]s has often been true in school aid cases, there is no dispute as to the first test." *School Dist. v. Ball*, 473 U.S. 373, 383 (1985). *See also Mueller v. Allen*, 463 U.S. 388, 394 (1983).

[¶58] We next ask whether the program, without the exclusion, would have the "impermissible effect of advancing religion." *Agostini* at 219.[29] Here, we conclude that the tuition program, without the religious school exclusion, would indeed have the "effect" of advancing religion.

[¶59] In contrast to programs that provide secular textbooks to children in religious schools (*Allen*), that provide special education teachers to children at religious schools (*Agostini*), that allow an interpreter to assist a hearing impaired child on religious school grounds (*Zobrest*), or that provide tax benefits to parents who must pay for their children's education (*Everson*), the Maine tuition program provides a direct financial subsidy to the schools. Each of the programs approved by the Supreme Court provide specific limited services to children in religious schools or provide limited financial benefits to the parents of those children, only indirectly benefitting the religious school.[30]

---

[29] Whether prong two and three are considered separately, as in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), or are collapsed into one test, as in *Agostini*, the next part of the analysis is similar.

[30] The Court also allowed the payment of college grant funds to a blind student seeking to train as a minister. *See*

[¶60] Maine's tuition program, however, results in state monies flowing directly to the religious institution, thereby funding the bulk of the school's costs for the education (religious and secular) of the child at issue. The tuition is based on the individual school's expenditures, capped by a state average, the payments are made directly to the school, and no limit or restriction is placed on the use of the State's payment by the schools. Although the school is chosen by parents, not the State, choice alone cannot overcome the fact that the tuition program would directly pay religious schools for programs that include and advance religion.

[¶61] None of the Supreme Court's decisions to date have ever intimated that such direct subsidies of religious schools could survive an Establishment Clause challenge.[31] Indeed, in the case relied on most heavily by

---

Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986). That case has little applicability to the facts before us. The Court noted that no other student had ever requested grant funds for such a purpose; the funds went directly to the student for use at the college of his choice; and the single grant would provide an attenuated benefit not to a high school, but to a college, institutions seen as distinct regarding concerns about the advancing of religion or inculcation of younger students. *See id.* at 488-89.

[31] Nonetheless, the parents point to footnote 38 in the *Nyquist* decision, in which the Court noted that it was not opining as to public assistance made available generally without regard to the "sectarian-nonsectarian or public-nonpublic nature of the institution benefitted," *Nyquist*, at 2970, n.38, as support for their position that the Supreme Court would not invalidate Maine's tuition program if it allowed tuition payments to religious schools. Their argument mistakenly reads an affirmative holding into the Court's mere delineation of the

the parents, *Agostini*, the Court found it important that "No Title I funds ever reach the coffers of religious schools." *Agostini*, 521 U.S. at 228 (distinguishing *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 657-59 (1980)). Moreover, the *Agostini* Court found it significant that the services provided at the religious school supplemented rather than supplanted the costs that would otherwise be born by that school. *See id.* at 229. In Maine, the tuition payment paid by the State to the chosen school would substantially "supplant" the costs that would otherwise be borne by the school. To allow the State to do so for religious schools would directly contradict the teachings of *Agostini*. As the Fourth Circuit recently noted, "[t]he Supreme Court has never upheld a direct transfer of monies to a pervasively sectarian institution to fund its core educational functions." *Columbia Union College v. Clarke*, 159 F.3d 151, 162 (4th Cir. 1998).

[¶62] The direct, substantial, and unrestricted nature of the financial benefit provided to a recipient school is starkly demonstrated by the record in this case. According to the calculations of the Department of Education, if Cheverus had been approved to receive tuition under the program, it could have received up to $5,379.63 per student, per year. The 1997-1998 tuition for a student

---

issues it was *not* deciding. It also ignores the import of caution against providing "a basis for approving through tuition grants the complete subsidization of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools – *a result wholly at variance with the Establishment Clause.*" *Id.* (Emphasis added).

attending Cheverus was $5,450. Thus, the tuition program would have covered almost the entire payment expected from parents. While the standard tuition payment at Cheverus does not cover the entire cost to the school per student, it does cover approximately 70% of those costs.[32] That kind of direct cash aid from the State to a religious institution is neither the "attenuated financial benefit" approved in *Mueller*, nor "aid that directly aids [only] the educational functions" approved in *Agostini*.

[¶63] Nor can it be disputed that the educational functions of Cheverus are intertwined with its religious goals. As it sets forth in its "Purposes and Objectives," "Cheverus regards the education of character (moral and spiritual education) as its most important purpose and objective as a school. The school works to implement the objective through a doctrinally faithful and morally challenging program of religious education and through liturgies, retreats, and community service." Full tuition payments to a religious school such as Cheverus would provide a direct, not attenuated, benefit and would directly aid the religious as well as the educational functions of the school.

[¶64] Finally, we address the State's concern that the elimination of the exclusion would result in excessive entanglement of the government in religious affairs.[33]

---

[32] John H.R. Mullen, principal at Cheverus, estimated in his affidavit that the average cost of educating a student at Cheverus during the 1996-97 school year was $7630.

[33] Much has been written regarding the continuing applicability of the "entanglement" prong of the *Lemon* test. *See*,

"Not all entanglements, of course, have the effect of advancing or inhibiting religion. . . . Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini*, 521 U.S. at 233. Signaling the lowering of the "high and impregnable walls" between church and state referred to in earlier cases, the Court in *Agostini* opined that "[i]nteraction between church and state is inevitable. . . . and we have always tolerated some level of involvement between the two." *Id.* (citations omitted).

[¶65] Although, by this language, we understand the Court to have announced a greater tolerance of interaction between church and state,[34] the *Agostini* Court unambiguously affirmed its previous holdings that excessive entanglement will "run afoul of the Establishment Clause." *Id.* The question therefore becomes: what level of interaction constitutes an "excessive" amount. To assess entanglement, we review three aspects of the interaction between the State and the religious school: (1) the character and purposes of the schools that are benefitted; (2) the nature of the aid that the State provides; and (3) the resulting relationship between the religious school and the State. *See id.* at 232.

---

e.g., Christopher D. Pixley, *The Next Frontier in Public School Finance Reform: A Policy and Constitutional Analysis of School Choice Legislation*, 24 J. LEGIS. 21, 57 n.201 (1998). The Agostini Court recognized it as an important part of the analysis, but perceived the entanglement question as a piece of its analysis on whether the government aid has the "effect" of advancing religion. *Agostini*, 521 U.S. at 232-33.

[34] *See, e.g.*, Christian Chad Warpula, *The Demise of Demarcation: Agostini v. Felton Unlocks the Parochial*, 33 WAKE FOREST L. REV., 465, 506-07 (1998).

[¶66] We have addressed the first two aspects previously. In the absence of the exclusion, the institutions benefitted by the tuition program would include public, private, and private-religious schools, including those that are pervasively sectarian. The nature of the aid is direct cash payments, unrestricted in use, to the schools.

[¶67] The third aspect, the resulting relationship between the State and the religious school, is more difficult to quantify. The school must report annually to the commissioner "the information the commissioner may require." 20-A M.R.S.A. § 2952. The school must submit its "books, accounts, financial documents and reports to the commissioner" for review and audit. *See* 20-A M.R.S.A. § 2953. The school will be subject to any rules duly adopted by the commissioner "regarding tuition charges, accounting, audits, contracts and other aspects of schooling privileges" arranged between it and the school administrative units. *See* 20-A M.R.S.A. § 2954. In the abstract, these requirements have the appearance of creating an excessive entanglement. We could not, however, make a final determination on this issue on the record before us. Because the tuition program has not included religious schools for the past 18 years and has therefore not encountered problems of entanglement, neither the rules nor the practical application of the statutory requirements were addressed in detail in the Superior Court.[35]

---

[35] Ordinarily, a court undertaking an entanglement analysis does so in the context of reviewing a state program that *does provide* aid to a religious institution.

[¶68] If the level of interaction between the State and Cheverus, absent the exclusion, were potentially dispositive in this case, we would remand the matter for further development of the record. Because we conclude, however, that the undisputed facts in the record make it abundantly clear that the tuition program, consisting of substantial unrestricted cash payments to religious institutions, would have an impermissible "effect" of advancing religion, we are not required to reach a final determination regarding the entanglement problem. A statute that has the effect of advancing religion violates the Establishment Clause, whether or not it results in an impermissible level of interaction between church and state.

[¶69] In a final effort to overcome the Establishment Clause impediment, the parents turn to several Free Speech decisions of the Supreme Court. This effort is also unavailing. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court struck down a public university's exclusion of religious organizations from the use of the university's meeting rooms and facilities, holding that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Id.* at 267-68. In a similar case, the Court found that the University of Virginia had violated the Free Speech principles of the First Amendment when it declined to reimburse religious groups for printing costs but provided reimbursement for all other groups. *See Rosenberger v. Rectors & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995).

[¶70] The issue before us is wholly distinct from those cases. The parents cannot assert that they have been

denied a forum for any type of speech. Rather, they seek to have the State pay for their childrens' education. Moreover, the *Rosenberger* Court explicitly distinguished school aid cases when it noted that "[t]his case is not controlled by the principle that special Establishment Clause dangers exist where the government makes direct money payments to sectarian institutions, . . . since it is undisputed that no public funds flow directly into [the religious group]'s coffers under the program at issue." *Id.* at 821 (citations omitted).

[¶71] That state funds would flow directly into the coffers of religious schools in Maine were it not for the existing exclusion cannot be debated. If the religious school exclusion were eliminated, the State would likely pay more than $5,000 per student per year to Cheverus High School, without restriction on the use of those funds. In the entire history of the Supreme Court's struggle to interpret the Establishment Clause it has never concluded that such a direct, unrestricted financial subsidy to a religious school could escape the strictures of the Establishment Clause. While it may be possible for the Legislature to craft a program that would allow parents greater flexibility in choosing private schools for their children, the current program could not easily be tailored to include religious schools without addressing significant problems of entanglement or the advancement of religion. It is up to the Legislature, not the courts, to determine whether and how to attempt to structure such a program.[36]

---

[36] The parents ask us, nonetheless, to assume that the next step in the Supreme Court's evaluation of states' efforts to

[¶72] Accordingly, we conclude that the current exclusion of religious schools from Maine's tuition program does not violate the Free Exercise or Establishment Clauses of the First Amendment or the Equal Protection mandates of the Fourteenth Amendment. Because we affirm the judgment of the Superior Court, we do not reach the parents' challenge to the court's dismissal of the cause of action against the Town of Raymond or the defendants' challenge to the trial court's evidentiary rulings.

The entry is

Judgment affirmed.

CLIFFORD, J., dissenting.

[¶73] Although I have little quarrel with the Court's analysis of the constitutionality of Maine's public and

---

provide innovation and flexibility in the delivery of education to the nations' children will be the approval of direct and unrestricted financial subsidies to religious schools. We decline to make that leap. Recognizing the difficulty that courts have encountered anticipating the Supreme Court's next step in the application of the Establishment Clause, Justice O'Connor admonished federal courts as follows:

> We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini, 521 U.S. at 237 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

private school tuition program as far as it relates to the Establishment Clause, I disagree with its final conclusion that the program is constitutional. In my view, the program, as presently constituted, violates the rights of the parents guaranteed by the Equal Protection Clauses of the federal and state constitutions.[37] Accordingly, I respectfully dissent.

[¶74] Applying to towns without their own public school system, 20-A M.R.S.A. § 5204 allows parents to choose the schools their children will attend, providing for the payment of tuition to private as well as public schools. Title 20-A M.R.S.A. § 2951(2), however, excludes sectarian schools from the choices available to the parents *solely* because of religious affiliation. *See* 20-A M.R.S.A. § 2951(2). Thus, the program is not neutral toward, but rather discriminates against, religion.

[¶75] The Equal Protection Clauses[38] prohibit disparate treatment of similarly situated persons. *See Nugent v. Town of Camden*, 1998 ME 92, ¶15, 710 A.2d 245, 249 (quoting *Wellman v. Department of Human Servs.*, 574 A.2d 879, 883 (Me. 1990) ("The prohibition against denial of equal protection of the law to any person is implicated

---

[37] The United States Constitution prevents any state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend, XIV.

The Maine Constitution provides that "[n]o person shall . . . be denied the equal protection of the laws. . . . " Me. Const. art. 1 § 6-A.

[38] State and federal equal protection guarantees are coextensive. *See School Admin. Dist. No. 1 v. Commissioner of Educ.*, 659 A.2d 854, 857 (Me. 1995).

only when action by the state results in treatment of that person [that is] different than that given similarly situated individuals.")). The tuition program clearly results in disparate treatment. In towns without a public school system, parents who desire to send their children to sectarian private schools are treated differently from parents who choose nonreligious private schools. Tuition is paid only for those private schools that are nonsectarian.

[¶76] Despite the statute's blatant discrimination against religion, the Court finds no constitutional violation because, the Court concludes, making religious schools eligible for the tuition program would *itself* violate the Establishment Clause of the First Amendment to the United States Constitution.

[¶77] The Court points out that including religious schools in the tuition program, *as it is presently constituted*, would probably result in noncompliance with Establishment Clause law. This is so because the tuition is paid directly to the schools and is substantial in amount, covering nearly the entire costs of the schools' programs. Moreover, the program, as presently designed, places few restrictions on the use of the money. The tuition could be used to benefit the religious as well as the secular educational aspects of the school. *See Columbia Union College v. Clarke*, 159 F.3d 151, 162 (4th Cir. 1998).

[¶78] In my view, however, the analysis cannot end there. The Establishment Clause is not the only constitutional provision implicated in this challenge to Maine's education tuition statute. The parents also allege a violation of their right to equal protection of the law.

[¶79] Because the disparate treatment mandated by the statute is based on religion, implicating the most fundamental of the parents' constitutional rights, we must subject the statute to a strict scrutiny analysis. *See School Admin. Dist. No. 1*, 659 A.2d at 857; *Choroszy v. Tso*, 647 A.2d 803, 808 (Me. 1994). The burden of justifying the discrimination is on the defendants. First, they must demonstrate that the classification excluding religious schools is justified by a compelling governmental interest. Second, they must show that the means chosen by the State to carry out the purpose of the program is narrowly tailored to the achievement of that goal. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

[¶80] The stated goal of the tuition program is laudable. It gives parents in towns without public schools a wide choice of schools, public and private, for their children to attend, and it does so without running afoul of the Establishment Clause.[39] The means chosen by the State to achieve its goal, however, must be narrowly tailored to the accomplishment of that objective.[40] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)

---

[39] School choice programs have great potential to improve our education system. *See* James A. Peyser, *Symposium: Issues in Education Law and Policy – School Choice: When, Not If*, 35 B.C. L. Rev. 619, 619-621 (1994). *See generally* Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 Geo. Mason Indep. L. Rev. 7 (1993).

[40] There is no indication in equal protection jurisprudence that the strict scrutiny analysis for religious-based classifications differs from the analysis of race-based classifications.

(a race-based classification necessary to further a compelling government interest is "within constitutional constraints if it satisfies the narrowly tailored test . . . set out in previous cases"). To determine whether a classification is "narrowly tailored," courts must consider "whether lawful alternative and less restrictive means could have been used." *Wygant*, 476 U.S. at 280 n.6, (citing Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723, 727, n.26 (1974) (classification must "fit with greater precision than any alternative means")).[41] "Fundamentally, narrow tailoring analysis asks whether a program is overinclusive or underinclusive to serve the purposes of the specific compelling interest on which the program is based." *Wessmann v. Gittens*, 160 F.3d 790, 828 (1st Cir. 1998) (Lipez, J., dissenting). We must therefore ask if the *complete and total exclusion* of religious schools is necessary to accomplish the goal of the tuition program? *See Wygant*, 476 U.S. at 280 (describing the means chosen by a State to accomplish its purpose under the strict scrutiny test). In my view, there is no need to totally exclude religious schools from the program in order to conform with the Establishment Clause.

[¶81] As the Court notes, in recent years, the Supreme Court has become less hostile to legislative attempts to provide aid to parents who choose to educate their children in religious schools. Recent cases demonstrate that aid programs that treat religion in a neutral

---

[41] *See also United States v. Paradise*, 480 U.S. 149, 171 (1987) (considering "the necessity for the relief and the efficacy of alternative remedies" when determining whether a classification was narrowly tailored).

fashion have been looked on favorably by both state courts and the Supreme Court. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (citing Supreme Court cases). *See also Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). These cases reflect a change from what was perceived to be a hostility toward religion to a benign neutrality.[42]

[¶82] In *Agostini*, the Supreme Court reiterated that the issue in Establishment Clause cases is "whether the government acted with the purpose of advancing or inhibiting religion . . . [and] whether the aid has the effect of advancing or inhibiting religion." 521 U.S. at 222-23. The Supreme Court, however, acknowledged that it has "departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225.

[¶83] Several states have recently enacted programs to expand educational choices for parents. In Ohio, scholarships are provided to parents to send their children to private schools, including religious schools. *See Simmons-Harris v. Goff*, Nos. 96APE08-982, 96APE08-991, 1997 WL

---

[42] In his dissent in *Aguilar v. Felton*, 473 U.S. 402 (1985), a case since overruled in *Agostini v. Felton*, 521 U.S. 203 (1997), Chief Justice Berger characterized the Establishment Clause test for separation of church and state used in *Aguilar* as unacceptable. "Rather than showing the neutrality the Court boasts of . . . [the test] exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools." *Aguilar*, 473 U.S. at 420 (Burger, C.J., dissenting).

217583 at *1 (Ohio Ct.App., May 1, 1997). In Wisconsin, state issued tuition vouchers allow low income parents to send their children to private schools, including religious schools. *See Jackson v. Benson,* 578 N.W.2d 602, 607-09 (Wis. 1998), *cert. denied,* 119 S.Ct. 466 (1998). And in Arizona, persons donating to school tuition organizations are allowed a state tax credit of up to $500. *See Kotterman v. Killian,* 972 P.2d 606, 609-10 (Ariz. 1999).

[¶84]′ In my view, the recent evolution of Establishment Clause jurisprudence and the programs being enacted in several states make it clear that the total exclusion of religious schools from a tuition program providing aid to parents of children attending private as well as public schools is not essential. Establishment Clause violations may be avoided by a tuition program that does not entirely exclude religious schools, but provides more limited tuition with reasonable restrictions conditioning the use of that aid. In *Jackson v. Benson,* for example, the Wisconsin Supreme Court found no Establishment Clause violation in a tuition voucher program that provided substantial monetary aid to religious schools without restriction on how the aid was used because the program: selects its beneficiaries based on random, nonreligious criteria; provides an "opt-out" provision that prevents private schools from requiring students to participate in religious activities; sends the economic aid to the religious school in the form of checks that must be endorsed by the parents; and limits the amount of tuition subsidy to the lesser of the Milwaukee Public School per student state aid or the private school's "operating and debt service cost per pupil." 578 N.W.2d at 609.

[¶85] A tuition program with similar or greater restrictions and conditions could be fashioned within the framework of the current statute with very little effort on the part of the State. Tuition in less substantial amounts could be authorized to benefit parents of children in religious schools. The tuition aid could be directed through the parents to avoid restrictions on direct aid and the State could require participating schools to accept an "opt-out" provision. In addition to the restrictions set forth in the Wisconsin program, the State could adopt reasonable conditions and restrictions on the use of the State aid, insuring that the moneys would not be used to directly subsidize the religious functions of the schools, avoiding both direct aid of religion and excessive entanglement of the State in religion. *See generally Mueller,* 463 U.S. at 396-403.

[¶86] Although the legislature need not offer any aid to parents who choose private schools for their children, if such aid is provided, the Equal Protection Clause prohibits discrimination based on religion in a program providing such aid unless the discrimination is absolutely necessary to avoid Establishment Clause violations. In my view, the defendants cannot rely on the Establishment Clause to justify the present tuition program that blatantly discriminates on the basis of religion, when a more narrowly tailored tuition program could be created that would lessen the discrimination based on religion, while still complying with the Establishment Clause. The Establishment Clause prevents the government from establishing a church, passing laws "which aid one religion, aid all religions, or prefer one religion over another," or punishing individuals for professing particular religious beliefs.

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). It was not intended to provide States with a blanket justification for discriminating against religion.

[¶87] I would vacate the judgment of the Superior Court and remand to that court for further proceedings.

Attorneys for plaintiffs:

Linda C. Russell, Esq.
Pettrucelli & Martin, LLP
50 Monument Square
Portland, ME 04104-5033
and
Richard D. Komer, Esq., (orally)
Clint Bolick, Esq.
William H. Mellor, Esq.
Institute for Justice
1717 Pennsylvania Ave., NW
Washington, DC 20006

Attorneys for defendants:

Michael E. Saucier, Esq., (orally)
Thompson & Bowie
P O Box 4630
Portland, ME 04112
(for Raympond School Department)

Andrew Ketterer, Attorney General
Peter J. Brann, State Solicitor, (orally)
6 State House Station
Augusta, ME 04333-0006
(for State defendants)

Donald F. Fontaine, Esq.
Fontaine & Beal, P.A.
P O Box 7590
Portland, ME 04112
and

Robert H. Chanin, Esq.
John M. West, Esq.
Page Kennedy, Esq.
Bredhoff & Kaiser, PLLC
1000 Connecticut Ave., NW, Suite 1300
Washington, DC 20036
(for Timothy Humphrey *et al.*)

Barbara G. Shaw, Esq.
Marcus Grygiel & Clegg, P.A.
100 Middle Street
Portland, ME 04101-4102
and
Jeffrey A. Thaler, Esq.
Bernstein, Shur, Sawyer & Nelson
P O Box 9729
Portland, ME 04101-5029
(for Maine Civil Liberites Union)

Attorneys for *amici curiae:*

David G. Webbert, Esq.
Johnson & Webbert, LLP
P O Box 29
Augusta, ME 04332-0029
and
Nathan Lewin, Esq.
Richard W. Garnett, Esq.
Miller, Cassidy, Larroca & Lewin, LLP
2555 M. Street, NW
Washington, DC 20037
and
Dennis Raps, Esq.
National Jewish Commission on Law and
Public Affairs
135 West 50th Street
New York, NY 10020
(for National Jewish Commission on Law and Public Affairs, Agudath Harabonim of the United States and

Canada, Agudath Israel of America, Union of Orthodox Jewish Congregations of America, National Council of Young Israel, Rabbinical Alliance of America, Rabbinical Council of America, and Torah Umesorah – National Society of Hebrew Day Schools)

David A. Soley, esq.
Bernstein, Shur, Sawyer & Nelson
P O Box 9729
Portland, ME 04104-5029
and
Steven K. Green, Esq.
Ayesha N. Khan, Esq.
Americans United for Separation of Church and State
1816 Jefferson Place, NW
Washington, DC 20036
and
Jeffrey P. Sinesky, Esq.
American Jewish Committee
165 East 56th Street
New York, NY 10022
and
Elizabeth J. Coleman, Esq.
Steven M. Freeman, Esq.
Lauren A. Levin, Esq.
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
and
Elliott M. Michberg, Esq.
Judith E. Schaeffer, Esq.
People for the American Way Foundation
2000 M Street, NW, Suite 400
Washington, DC 20036
(for Americans United for Separation of Church and State, American Jewish Committee, Anti-Defamation League of B'nai B'rith, People for the American Way Foundation)

Michael H. Hill, Esq.
Monaghan, Leahy, Hochadel & Libby
P O Box 7046
Portland, ME 04112-7046
and
Kevin J. Hasson, Esq.
Eric W. Treene, Esq.
The Becket Found for Religious Liberty
2000 Pennsylvania Ave., NW, Suite 3580
Washington, DC 20006
and
Daniel E. Troy, Esq.
Alex M. Azar II, Esq.
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006
(for The Becket Fund for Religious Liberty)

APPENDIX B

STATE OF MAINE CUMBERLAND, ss	SUPERIOR COURT CIVIL ACTION DOCKET NO. CV-97-484
ROBERT BAGLEY, et al., PLAINTIFFS vs. MAINE DEPARTMENT OF EDUCATION, et al., DEFENDANTS	ORDER ON MOTIONS FOR SUMMARY JUDGMENT (Filed Apr. 20, 1998)

The plaintiffs, the defendant Maine Department of Education, and the intervenors have filed motions for summary judgment on the plaintiffs' complaint for declaratory judgment that 20-A M.R.S.A. § 2951(2) is unconstitutional. 20-A M.R.S.A. § 2951(2) (1993). At argument, the parties agreed that there are no disputed issues of material fact except with regard to the Bagleys' motivation for sending their son to Chevrus. After review of the record, the court concludes that none of the plaintiffs alleges that he or she was mandated by religion to send a son to Chevrus and none of the plaintiffs alleges that his or her son's attendance at Chevrus constitutes the observation of a central religious belief or practice. (*See, e.g.*, Pl. SMF, ¶ 7; Def. Maine Department of Education SMF ¶ 25; Pl. Response to Def. SMF, ¶ 24-25; Deposition of Cynthia Bagley, pp. 22-24, 30-32; Deposition of Robert Bagley, pp. 22, 24).

The plaintiffs argue that the failure of the defendant Maine Department of Education, based on 20-A M.R.S.A. § 2951(2), to pay for the plaintiffs' sons' education at

Chevrus High School, a pervasively sectarian Catholic school, violates the Free Exercise Clause of the First Amendment, violates the Establishment Clause of the First Amendment, violates the Equal Protection Clause of the Fourteenth Amendment, and violates Maine's Constitution.

FREE EXERCISE

The defendants argue that the plaintiffs cannot show a violation of their free exercise rights because they have not shown that sending their sons to Chevrus is a central religious belief or practice and that the State's failure to send the plaintiffs' sons to Chevrus has substantially burdened the plaintiffs' religious beliefs or practices. The defendants further state that even if the plaintiffs had made that preliminary showing, complying with the establishment clause is a compelling state interest which justifies that burden. *See Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). The plaintiffs respond that § 2951 discriminates against religion because the only type of private secondary school that is not paid for with public funds is a sectarian school; accordingly, the plaintiffs argue, the "substantial burden" analysis is not appropriate under the circumstances of this case. *See Brown v. Borough of Mahaffey*, 35 F.3d 846, 849 (3rd Cir. 1994).

The court does not conclude that § 2951 discriminates against religion. *See, e.g., Church of the Lukumi Babalu Ave, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) (object of law to infringe upon or restrict practices because of religious motivation). The plaintiffs are free to send their sons to Chevrus. Section 2591 provides only that public funds

will not flow into the coffers of sectarian schools. *See Rosenberger v. University of Virginia*, 132 L.Ed.2d 700, 723-24 (1995).

The court agrees that the plaintiffs have not shown that sending their sons to Chevrus is mandated by their religion. Even assuming that the Bagleys had raised an issue of material fact concerning their motivation for sending their son to Chevrus, the state's failure to subsidize an education at Chevrus does not constitute a substantial burden on the exercise of religion. *Goodall v. Stafford County School Board*, 60 F.3d 168, 172 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 706 (1996); *Brusca v. Missouri*, 332 F. Supp. 275, 277 (E.D. Mo. 1971), *aff'd* 405 U.S. 1050 (1972). Finally, as discussed below, excluding tuition payments for sectarian schools is compelled by compliance with the Establishment Clause.

ESTABLISHMENT CLAUSE

Section 2951 does not violate the establishment clause because § 2951 has a secular legislative purpose, the primary effect is one that neither advances nor inhibits religion, and § 2951 does not excessively entangle government and religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).[1] Changing the statute to provide for tuition payments for sectarian schools would violate the

---

[1] The court does not agree with the plaintiffs' argument that determining which schools can be approved for tuition purposes fosters excessive entanglement, *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988), or that § 2591 fosters hostility toward religion. *Jackson v. California*, 460 F.2d 282, 283 n.1 (9th Cir. 1972).

establishment clause because the effect would be to subsidize and advance religion. *Committee for Public Education & Religions Liberty v. Nyquist*, 413 U.S. 756, 780 (1973); *see also Agostini v. Felton*, 117 S.Ct. 1997, 2013 (1997); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 487 (1986).

MAINE CONSTITUTION

Because the court concludes that the denial of tuition to the plaintiffs does not violate the United States Constitution, the court concludes that that denial does not violate the Maine Constitution. Me. Const. Art. I, §§ 3, 6-A; Art. VIII, § 1 (Supp. 1997-1998); *Blount v. Department of Educational and Cultural Services*, 551 A.2d 1377, 1385 (Me. 1988).

EQUAL PROTECTION

The prohibition of using public funds to pay for tuition to sectarian schools does not violate the Equal Protection Clause. *Norwood v. Harrison*, 413 U.S. 455, 462 (1973); *Blount*, 551 A.2d 1385-86.

The entry is

The Plaintiffs' Motion for Summary Judgment is DENIED.

The Defendants and Intervenors' Motions for Summary Judgment are GRANTED.

Judgment is entered in favor of the Defendants and against the Plaintiffs on the Plaintiffs' Complaint. 20-A M.R.S.A. § 2951 is not unconstitutional.

Date: April 20, 1998

/s/ Nancy Mills
Nancy Mills
Justice, Superior Court

APPENDIX C

20-A M.R.S.A. § 2951. Approval for tuition purposes

A private secondary school may be approved for the receipt of public funds for tuition purposes only if:

1. **Basic approval.** Meets the requirements for basic school approval under subchapter I;

2. **Nonsectarian.** Is a nonsectarian school in accordance with the First Amendment of the United states Constitution;

3. **Incorporated.** Is incorporated under the laws of the State of Maine or of the United States;

4. **Repealed.** Laws 1983, c. 859, § A, 8.

5. **Additional requirements.** Complies with the reporting and auditing requirements in sections 2952 and 2953 and the requirements adopted pursuant to section 2954;

6. **Student assessment.** Any school which enrolls 60% or more publicly-funded students, as determined by the previous year's October and April average enrollment, shall participate in the statewide assessment program to measure and evaluate the academic achievements of students; and

7. **Release of student records.** Upon the request of a school unit, release copies of all student records for students transferring from the private school to the school unit.

20-A M.R.S.A. § 5204(4) Secondary students right to attend school in another administrative unit

The following provisions govern the right of secondary students to attend school in another administrative unit other than the one in which they are resident.

* * *

4. No secondary school. Secondary students whose parents reside in a unit which neither maintains a secondary school nor contracts for secondary school privileges may attend a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country upon permission of officials of the receiving school. The school administrative unit where the students' parents reside shall pay tuition in the amount upon to the legal tuition rate as defined in chapter 219.*

* Section 5801 et seq. of this title.

Supreme Court, U.S.
FILED
AUG 30 1999
CLERK

No. 99-163

In The

Supreme Court of the United States

CYNTHIA BAGLEY, *et al.*,

Petitioners,

v.

RAYMOND SCHOOL DEPARTMENT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANDREW KETTERER
Attorney General

PAUL STERN
Deputy Attorney General
(*Counsel of Record*)

WILLIAM R. STOKES
Assistant Attorney General
Six State House Station
Augusta, Maine 04333-0006
(207) 626-8800

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Establishment Clause of the United States Constitution require the State to pay unrestricted, direct subsidies to a pervasively sectarian school for a religious education?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

RESPONDENTS' BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 1

REASONS FOR DENIAL OF THE WRIT 5

I. THE COURT SHOULD DENY THE WRIT BECAUSE THE ISSUES ARE NOT PROPERLY FRAMED 5

II. THE MAINE DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS 7

III. THE MAINE DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR ANY FEDERAL CIRCUIT COURT 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 4, 6, 7, 9, 10

Bagley v. Raymond School Dept, 728 A.2d 127 (Me. 1999) 1, 10, 13

Campbell v. Manchester Board of School Directors, 641 A.2d 352 (Vt. 1994) 11

Chittenden Town School District v. Vermont Department of Education, 1999 Vt.LEXIS 98 (June 11, 1999) 11

Chittenden Town School District v. Vermont Department of Education, No. S0478-96RC (Vt. Super. Ct., Rutland Cty., June 27, 1997) 11

Columbia Union College v. Clark, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3755 (June 14, 1999) 10

Community for Public Education v. Nyquist, 413 U.S. 756 (1973) 7, 8, 11

Grand Rapids School District v. Ball, 473 U.S. 373 (1985) 9

Hernandez v. Commissioner, 490 U.S. 680 (1989) ... 3, 5, 6

Jackson v. Benson, 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S.Ct. 466 (1998) 12

Kotterman v. Killiam, 972 P.2d 606 (Ariz. 1999), *petition for cert. filed*, 67 U.S.L.W. 3671 (U.S. Apr. 26, 1999) (No. 98-1716) 11

Lemon v. Kurtzman, 403 U.S. 602 (1971) 4, 6

Matthew J. v. Massachusetts Department of Education, 989 F.Supp. 380 (D.Mass. 1998) 12

TABLE OF AUTHORITIES – Continued

Page

Mitchell v. Helms, 151 F.3d 347 (5th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3756 (U.S. June 14, 1999) (No. 98-1648) 12, 13

Mueller v. Allen, 463 U.S. 388 (1983) 4, 8, 9

Peter v. Wedl, 155 F.2d 992 (8th Cir. 1998) 12

Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976) 8

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995) 7, 9

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio, 1999) 12

Simmons-Harris v. Zelman, No. I: 99-CV-1740 & 1818 (N.D. Ohio, Aug. 24, 1999) 12

Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3129 (U.S. Aug. 12, 1999) (No. 99-254) 10

Witters v. Washington Department of Service for the Blind, 474 U.S. 41 (1986) 8

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 9, 12

STATUTES

20-A M.R.S.A. § 1001(8) 1

20-A M.R.S.A. § 2951 2

20-A M.R.S.A. § 2951(2) 2, 3

20-A M.R.S.A. § 5204 2

20-A M.R.S.A. § 11612 13

TABLE OF AUTHORITIES – Continued

Page

35 ILCS 5/201(m)..... 13

Fla.Stat., ch. 229.0537(6)(b)..... 13

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Maine Department of Education and Commissioner of Education J. Duke Albanese ("Maine"), respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), issued on April 23, 1999, reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1-57, reported in *Bagley v. Raymond School Dept.*, 728 A.2d 127 (Me. 1999).

STATEMENT OF THE CASE

The parties agree that the material facts are undisputed. Petitioners here seek to have the courts require the State to pay an unrestricted, direct public subsidy to a pervasively sectarian high school for a religious education. Such a direct payment has never been approved by this Court or, for that matter, in any case referred to by petitioners. Indeed, the case law has established this bar as a cornerstone in First Amendment jurisprudence.

The State of Maine operates a tuition program. Maine requires all school districts to provide education for their residents from kindergarten to the 12th grade. 20-A M.R.S.A. § 1001(8). Approximately one-half of the school districts satisfy this obligation by operating their own elementary and secondary schools. However, the other half of the school districts, including that of the Town of Raymond, satisfy this obligation for at least some of their school children through a tuition program established

pursuant to 20-A M.R.S.A. § 5204. Under this program, some districts do not operate schools but rather pay tuition for all of their students to attend other schools.

Under this program, the school district pays tuition directly to a public school or to a private school that has been approved for tuition purposes pursuant to 20-A M.R.S.A. § 2951. The statute specifically provides that sectarian schools are ineligible for approval for tuition purposes. 20-A M.R.S.A. § 2951(2). Nearly 14,000 students attend public or approved private schools under the tuition program, resulting in the expenditure of approximately $70 million in public funds.

Raymond operates a public elementary school, which all of the petitioners' children attended. However, Raymond does not run a junior or senior high school, and instead provides secondary education through the tuition program.

The petitioners – five families in Raymond – send their sons to Chevrus High School. Chevrus is an admittedly all male, pervasively sectarian high school. Although Chevrus is a Catholic high school, most of the petitioners are not Catholic, and those who are Catholic are not practicing Catholics. Most of the petitioners choose to send their sons to Chevrus for academic, social or athletic reasons, and none of the petitioners contend that a central tenet of their religion compels them to send their sons to Chevrus.

On July 31, 1997, petitioners filed suit against Raymond and Maine.[1] Petitioners contended that the school district and Maine were required by the Establishment Clause and the Free Exercise Clause of the First Amendment to make direct, unrestricted payments to the pervasively sectarian high school. After dismissal of the school district,[2] the remaining parties filed cross-motions for summary judgment. In its decision, the Superior Court granted the State's motion and denied that of the petitioners, holding that 20-A M.R.S.A. § 2951(2) did not violate the petitioners' constitutional rights. Pet. App. at 58-61. Of note, the Superior Court found that none of the petitioners allege that he or she was mandated by religion to send their son to Chevrus and none allege that his or her son's attendance constitutes the observance of a central religious belief or practice. Pet. App. at 58, 60.

On appeal, the Law Court affirmed, presenting a three-part analysis. First, the Law Court found that, although there remained a question as to whether the activity burdened by the regulation is motivated by sincerely held religious beliefs, *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), the Free Exercise Clause was not violated here because the parents had no right to require Maine to pay for the exercise of their religion. Pet. App. at 11-15.

---

[1] Subsequently, certain taxpayers and the Maine Civil Liberties Union intervened without objection.

[2] The dismissal of the school district below is not an issue being raised before this Court.

Second, the Law Court correctly reasoned that the Establishment Clause does not prevent the State from refusing to fund religious schools. Pet. App. at 15-17.

Finally, the court provided a thorough analysis of the equal protection claim. The court presented an historical overview of the development of Establishment Clause jurisprudence, noting in particular that:

> None of the Supreme Court's decisions to date have ever intimated that . . . direct subsidies of religious schools could survive an Establishment Clause challenge.

Pet. App. at 39. The Law Court went on to note that the "direct, substantial, and unrestrictive nature of the financial benefits" provided to a sectarian school is starkly demonstrated by the record in this matter, where Chevrus would receive $5,379.73 per student under the tuition program, while tuition for the 1997-1998 school year for a student attending Chevrus was $5,450. Pet. App. at 40-41. Such a cash payment from the State to a pervasively sectarian school is neither the "attenuated financial benefit" approved in *Mueller v. Allen*, 463 U.S. 388 (1993), nor "aid that directly aids [only] educational functions" validated in *Agostini v. Felton*, 521 U.S. 203 (1997). Pet. App. at 41. Therefore, the Law Court found that the State's denial of direct subsidies to sectarian schools was well-founded under the Establishment Clause, and, applying a strict scrutiny analysis (with which we disagree), concluded there was no denial of equal protection. The Law Court did so while expressly not addressing the excessive entanglement prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), on the record before it. Pet. App. at 43-44.

The lone dissenter concluded the program violates the parents' rights guaranteed by the Equal Protection Clause of the federal or state constitution. Pet. App. at 46. This Justice suggested that a more narrowly tailored program to avoid direct aid for religious education could be created, concluding the present scheme is discriminatory. Pet. App. at 53.

REASONS FOR DENIAL OF THE WRIT

There is no compelling reason for the Court to review the Law Court's decision in this case. First, the issues the petitioners wish to present to the Court are not properly framed in the record. Second, and more fundamentally, this Court, and the lower courts, have been both clear and consistent throughout the development of the jurisprudence surrounding the First Amendment that direct subsidies to pervasively sectarian schools for religious education violates the Establishment Clause. This Court has never suggested that the exercise of religious rights requires public subsidization.

I. THE COURT SHOULD DENY THE WRIT BECAUSE THE ISSUES ARE NOT PROPERLY FRAMED.

Petitioners ignore two fundamental deficiencies in the record. First, the Superior Court found that the petitioners "have not shown that sending their sons to Chevrus is mandated by their religion." Pet. App. at 60. "The free exercise inquiry asks whether the government has placed a substantial burden on the observance of a central religious belief or practice . . ." *Hernandez v.*

Commissioner, 490 U.S. 680, 699 (1989). On appeal, the Law Court recognized this requirement, but sidestepped it, indicating its reluctance to delve into the religious beliefs of the petitioners. That court simply assumed *arguendo* that the parents "raised disputes of fact" regarding matters central to their religious beliefs, and went on to address the "burden" issue. Pet. App. at 11-14.

Thus, the only finding in the record is that petitioners were not motivated by religious belief. With this factual gap present, it would be inappropriate for this Court to consider alleged violations of petitioners' religious rights where it is less than clear that their religion is actually in issue.

Second, the petitioners wish to have this Court further clarify the three prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The third prong – excessive entanglement – although now perhaps subsumed within the other criteria, still must be considered. *Agostini v. Felton*, 521 U.S. at 232-33. Here, the Law Court found that the record before it was insufficient to make a determination of that issue. Pet. App. at 43-44. Thus, the record is such that this Court could only provide an advisory opinion on the issue.

For these reasons, this certainly is not the case for the Court to consider the First Amendment issues as sought by petitioners.

II. THE MAINE DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS.

In developing its First Amendment jurisprudence over the last three decades, the Court has focused on the specific features of the particular government action before it, cautioning further that the Court's precedent remains intact unless directly overruled. *Agostini*, 521 U.S. at 203; *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 852 (1995) (O'Connor, J., concurring). The Court has consistently and clearly stated that neither the Establishment Clause nor the Free Exercise Clause requires direct governmental financial subsidies to a sectarian school for a religious education. The invalidity of direct payments to religious schools for a religious education has not been questioned. The jurisprudence surrounding the Establishment Clause has developed in an effort to determine whether particular types of aid constitute unconstitutional direct payment of public funds from the government to a religious school.

In *Community for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court had before it three forms of educational aid: direct grants to nonpublic schools, tuition reimbursement to parents, and tax deductions to parents. The Court struck down direct unrestricted grants to sectarian schools as anathema to the Establishment Clause. *Id.* at 774-76. The majority also rejected the two other forms of aid with regard to sectarian schools. Writing for the dissent, Justice Rehnquist only disagreed with those portions of the decision relating to tax credits and deductions, and did not dissent to the striking down of outright grants. *Id.* at 805-06. Indeed, Justice Rehnquist wrote that

it was "clear that tax deductions and exemptions, even when directed to religious institutions, occupy quite a different constitutional status under the religion clauses of the First Amendment than do outright grants to such institutions." *Id.* at 806.

In *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 747 (1976), the plurality approved grants to private colleges, including religious affiliated ones, of funds that could not be used for sectarian purposes. Again, the Court was clear that:

> The State may not, for example, pay for what is actually religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.

Id. at 747.

Subsequent decisions of this Court have not questioned the invalidity of direct grants to sectarian schools for religious education. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld tax deductions for actual expenses incurred for the tuition, textbooks and transportation of dependents attending private sectarian as well as non-sectarian and public schools. In writing for the majority, Justice Rehnquist reiterated that the direct transmission of subsidies from the state to the sectarian schools themselves were invalidated by the Court and were of a different type of aid than that before the Court in *Mueller*. *Id.* at 399 & n.11. In *Witters v. Washington Department of Service for the Blind*, 474 U.S. 41 (1986), in upholding assistance to a blind person at a religious college, the Court again stated that it is well-settled "that

the State may not grant to a religious school, whether cash or inkind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id.* at 487, *quoting Grand Rapids School District v. Ball*, 473 U.S. 373, 394 (1985).

Likewise, in upholding the provision of a sign language interpreter for a student at a religious school, the Court, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12-13 (1993), emphasized that such services were valid because they were not direct financial support for non-public sectarian institutions. This Court's 1995 decision in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), upheld the expenditure of University money to pay an independent contractor to print a student religious newspaper. There, too, the Court "recognized the special Establishment Clause dangers where the government makes direct money payments to sectarian institutions," which were not present in that case. *Id.* at 841, 842. In a concurring opinion, Justice O'Connor emphasized that the Court's decisions "provide no precedent for the use of public funds to finance religious activities," and the *Rosenberger* decision "neither trumpets the supremacy of the neutrality principal nor signals the demise of the funding prohibition in Establishment Clause jurisprudence." *Id.* at 847, 852. Justice O'Connor correctly pointed out that the focus must be on the specific features of the particular governmental action put before it. *Id.* at 852.

Finally, this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997), dealt with the provision of supplemental, remedial instruction – secular in nature – in private and

parochial schools. The majority decision written by Justice O'Connor reasoned that these services were supplemental, and did not relieve sectarian schools of costs they otherwise must bear in educating their students. *Id.* at 228. The Court emphasized that no funds ever reached the coffers of religious schools, reiterating that the nature of the aid that the State provides remains a critical factor. *Id.* at 232.

This Court's cases, therefore, have been unwavering in holding that direct financial subsidies to a pervasively sectarian school for religious education is and remains unconstitutional. Certainly, there is no hint by the Court that a state is required to pay such subsidies. Thus, the Law Court's decision here is in full conformance with this Court's consistent holdings on the subject.

III. THE MAINE DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR ANY FEDERAL CIRCUIT COURT.

The Law Court's decision in *Bagley* conflicts with no state court of last resort or a circuit court regarding direct financial aid to religious institutions. In *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3129 (U.S. Aug. 12, 1999) (No. 99-254), the First Circuit held this identical program to be in full conformance with the First Amendment. Likewise, in *Columbia Union College v. Clark*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3755 (June 14, 1999), the Fourth Circuit correctly found that direct funding to pervasively sectarian institutions would violate the Establishment

Clause, and remanded the matter to determine whether the institution was, indeed, pervasively sectarian.

The cases referred to by petitioners present no conflict. In *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994), the court could not be more clear when it stated:

> Recognizing that direct payments to a sectarian institution may raise additional considerations, we do not address the validity of the direct payment to a sectarian institution.

Id. at 359. The Vermont court, thus, did not deal with the issue before the Law Court in Maine.[3]

Nor does the Law Court's decision conflict with the Arizona court's holding in *Kotterman v. Killiam*, 972 P.2d 606 (Ariz. 1999), *petition for cert. filed*, 67 U.S.L.W. 3671 (U.S. Apr. 26, 1999) (No. 98-1716). There, in a 3 to 2 decision, the court upheld a complicated state tax credit because there were no direct subsidies, recognizing that such subsidies affront the constitution. *Id.* at 616. The

---

[3] Subsequently, the Vermont court found the tuition reimbursement program, which called for payments to sectarian schools, to be unconstitutional under provisions of the Vermont constitution, relying on the same historical analysis as that found in *Nyquist*. *Chittenden Town School District v. Vermont Department of Education*, 1999 Vt.LEXIS 98 (June 11, 1999). Thus, the suggestion of a conflict with a sister state is even more muddled. Further, in considering the earlier *Campbell* case, the lower court dismissed its holding, finding quite clearly that direct payments to sectarian schools under the Vermont program did violate the Establishment Clause. *Chittenden Town School District v. Vermont Department of Education*, No. S0478-96RC (Vt. Super. Ct., Rutland Cty., June 27, 1997).

Ohio court in *Simmons-Harris v. Goff*, 711 N.E.2d 203, 209 (Ohio, 1999), struck down on state constitutional grounds a school reimbursement program involving scholarships paid to the student's parents, noting that "[d]irect government subsidies to religious schools are clearly unconstitutional." The Ohio court's dicta that the Establishment Clause is not violated by the scheme has since been repudiated, at least preliminarily, in *Simmons-Harris v. Zelman*, No. I: 99-CV-1740 & 1818 (N.D. Ohio, Aug. 24, 1999). The District Court granted a motion to preliminarily enjoin the Ohio program, concluding that the Ohio Supreme Court's reasoning regarding the Establishment Clause is unpersuasive and that there is "a very substantial chance" that the program will be found to violate the First Amendment. *Slip op.* at 26 & 28.

In *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S.Ct. 466 (1998), the Wisconsin court had before it a program where public funds were paid to parents, not to the school, and the funds could only cover educational programming. In a split decision, the Court upheld the plan emphasizing that this program did not involve the direct flow of a subsidy from the government to the school.

The decision in *Peter v. Wedl*, 155 F.2d 992 (8th Cir. 1998), is not in conflict with the Law Court as it involves the provision of a full-time paraprofessional to function in a classroom for a severely disabled student, a service little different in kind than the provision of an interpreter in *Zobrest*.[4] Similarly, *Mitchell v. Helms*, 151 F.3d 347 (5th

---

[4] Likewise, the lower court decision in *Matthew J. v. Massachusetts Department of Education*, 989 F.Supp. 380 (D.Mass.

Cir. 1998), *cert. granted*, 67 U.S.L.W. 3756 (U.S. June 14, 1999) (No. 98-1648), does not require direct financial subsidies to schools. Rather, it involves the assignment of publicly paid special education teachers and educational materials to sectarian schools for secular purposes.

As is obvious, none of the cases requires direct subsidies from the government to a religious school to be used for religious purposes, and, indeed, each court goes to great pains to distinguish the particular aid at issue from direct, financial subsidies. Thus, there is no conflict, and there is no present need to address this issue.

Finally, particularly at note 16, petitioners recite fears, as yet unsubstantiated, regarding other programs. Petitioners have not cited to any case law drawing these programs into question under the Establishment Clause. Thus, the concerns are premature, and certainly do not form the basis to grant a writ of certiorari. Further, the listed programs are generally dissimilar to that dealt with in *Bagley*, and involve credits, loans, or scholarships directly to students or their parents (*see, e.g.*, 35 ILCS 5/201(m); 20-A M.R.S.A. § 11612; Fla.Stat., ch. 229.0537(6)(b)), or wholly secular activities such as lunches or medical care, matters far different than requiring a state to directly subsidize religious education.

1998), dealt with special education, and involved an extreme case where the school district totally abdicated all of its responsibilities, leaving the parents no alternative other than a private sectarian school.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

ANDREW KETTERER
Attorney General

PAUL STERN
Deputy Attorney General
(*Counsel of Record*)

WILLIAM R. STOKES
Assistant Attorney General

Six State House Station
Augusta, Maine 04333-0006
(207) 626-8800

Attorneys for Respondents

(3)

Supreme Court, U.S.
FILED
AUG 30 1999
OFFICE OF THE CLERK

No. 99-163

IN THE

Supreme Court of the United States

CYNTHIA AND ROBERT BAGLEY, GARY AND CYNTHIA ST. PIERRE, DENNIS AND PATRICIA COLE, RICKY AND MARY THORNTON, AND JACK AND STACIA FITCH,

Petitioners,

v.

RAYMOND SCHOOL DEPARTMENT, MAINE DEPARTMENT OF EDUCATION and its COMMISSIONER J. DUKE ALBANESE, TIMOTHY HUMPHREY, JANE HUMPHREY, FRANK MCDERMOTT, TIMOTHY MORIN, JOAN MORIN, TIMOTHY FITZGERALD, KEN WILLIAMS, BARBARA WILLIAMS, and the MAINE CIVIL LIBERTIES UNION,

Respondents.

On Petition for a Writ of Certiorari to the Maine Supreme Judicial Court Sitting as the Law Court

BRIEF IN OPPOSITION OF RESPONDENTS TIMOTHY HUMPHREY, *ET AL.* AND MAINE CIVIL LIBERTIES UNION

ROBERT H. CHANIN *
JOHN M. WEST
ANDREW D. ROTH
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

DONALD F. FONTAINE
FONTAINE & BEAL, P.A.
482 Congress Street
P.O. Box 7590
Portland, Maine 04112
(207) 879-1879

JEFFREY THALER
BERNSTEIN, SHUR, SAWYER & NELSON
100 Middle Street
Portland, Maine 04101
(207) 774-1200

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

22 pp

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	1
A. Statement of Facts	1
B. Proceedings Below	3
C. The First Circuit's Subsequent Decision in *Strout v. Albanese*	5
REASONS FOR DENYING THE WRIT	6
THE INSTANT CASE DOES NOT PROVIDE AN APPROPRIATE VEHICLE FOR RESOLVING THE ESTABLISHMENT CLAUSE QUESTION RAISED BY VOUCHER PROGRAMS THAT INCLUDE SECTARIAN PRIVATE SCHOOLS	6
A. This Case Does Not Involve A Program Pursuant To Which Public Funds Are Used To Pay For A Sectarian Private School Education	7
B. The Conclusion Of The Court Below That The Inclusion Of Sectarian Private Schools In Maine's Voucher Program Would Violate The Establishment Clause Was Not Necessary To The Disposition—And Rejection—Of Petitioners' Equal Protection Clause Claim	11
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Agostini v. Felton, 521 U.S. 203 (1997) 8, 17
Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1973) 16
Brusca v. Missouri, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972) 13, 14, 17
Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 7, 8
Everson v. Board of Education, 330 U.S. 1 (1947) 14
FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 16
Hicks v. Miranda, 422 U.S. 332 (1975) 13
Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356 (1973) 16
Lemon v. Kurtzman, 403 U.S. 602 (1971) 8
Leutkemeyer v. Kaufmann, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) 13, 14, 15, 17
Nordlinger v. Hahn, 505 U.S. 1 (1992) 16
Sherbert v. Verner, 374 U.S. 398 (1963) 4
Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999) 5, 6, 15, 18

STATUTES

20-A M.R.S.A. § 1001(8) 2
20-A M.R.S.A. § 2951(2) 2

IN THE

Supreme Court of the United States

No. 99-163

CYNTHIA AND ROBERT BAGLEY, GARY AND CYNTHIA ST. PIERRE, DENNIS AND PATRICIA COLE, RICKY AND MARY THORNTON, AND JACK AND STACIA FITCH,

Petitioners,

v.

RAYMOND SCHOOL DEPARTMENT, MAINE DEPARTMENT OF EDUCATION and its COMMISSIONER J. DUKE ALBANESE, TIMOTHY HUMPHREY, JANE HUMPHREY, FRANK MCDERMOTT, TIMOTHY MORIN, JOAN MORIN, TIMOTHY FITZGERALD, KEN WILLIAMS, BARBARA WILLIAMS, and the MAINE CIVIL LIBERTIES UNION,

Respondents.

On Petition for a Writ of Certiorari to the Maine Supreme Judicial Court Sitting as the Law Court

BRIEF IN OPPOSITION OF RESPONDENTS TIMOTHY HUMPHREY, *ET AL.* AND MAINE CIVIL LIBERTIES UNION

Respondents Timothy Humphrey, *et al.* and Maine Civil Liberties Union, defendants-intervenors in the proceedings below, submit this Brief in Opposition to the Petition for a Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

The State of Maine requires all school districts to provide a free kindergarten through twelfth grade education

to its residents. 20-A M.R.S.A. § 1001(8). School districts may fulfill this statutory obligation by operating their own public schools, or by paying the tuition incurred by resident families in sending their children to public or approved private schools, pursuant to the State's education tuition program ("voucher program"). Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 1-2.[1]

Approximately half of the school districts in Maine satisfy their statutory obligation by operating public elementary and secondary schools. The other half satisfy their obligation either wholly through the voucher program, or by operating some schools—usually elementary —and paying tuition for pupils to attend those schools which the school districts do not operate. *Id.* at 3.

Prior to 1981, sectarian private schools were eligible to participate in the Maine voucher program. In 1981, however, the Maine Legislature made such schools ineligible for the program by amending the governing statute to provide that "[a] private secondary school may be approved for the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A M.R.S.A. § 2951(2). This statutory amendment was in response to an opinion by the Maine Attorney General that the inclusion of sectarian schools in the voucher program violated the Establishment Clause of the First Amendment. Pet. App. at 3-4.

Petitioners are the parents of children residing in the Raymond School District ("Raymond"), which does not operate a public high school, but instead provides sec-

---

[1] If a school district elects to fulfill its statutory obligation through the voucher program, it pays the tuition directly to the public or approved private school in question. Pet. App. at 2-3.

ondary education through the voucher program. In 1997 —some sixteen years after the voucher program had been amended specifically to exclude sectarian private schools— petitioners enrolled their children at Cheverus High School —a pervasively sectarian private school operated by the Society of Jesus—and demanded that Raymond pay the tuition. When Raymond refused—citing the voucher program's specific exclusion of sectarian private schools— petitioners brought suit in state court against Raymond, the Maine Department of Education, and the Commissioner of Education, asserting, *inter alia*, that their rights under the Free Exercise, Establishment, and Equal Protection Clauses of the United States Constitution had been infringed by Raymond's refusal to pay the tuition. *Id.* at 4-6.[2]

B. Proceedings Below

The trial court granted motions for summary judgment by defendants and intervening defendants, and petitioners appealed as of right to the Supreme Judicial Court of Maine. That court framed the issues before it on appeal as follows:

> This appeal presents a unique question, requiring that we articulate with precision the issues before us. Unlike most recent cases addressing educational programs that provide state funding for religious schools, we are not called upon to determine whether a particular program in which state funds benefit religious schools violates the Establishment Clause.

---

[2] Petitioners also claimed a violation of their rights under the Maine Constitution. The court below found that the Maine Constitution was co-extensive with the United States Constitution in all relevant respects, Pet. App. at 8, and thus framed the issues presented solely in terms of whether the Maine voucher program violated the latter constitution.

> Instead, we are presented with the opposite question: whether a tuition program that specifically excludes religious schools violates any of three constitutional provisions: the Establishment Clause of the First Amendment; the Free Exercise Clause of the First Amendment; or the Equal Protection Clause of the Fourteenth Amendment. These distinctions are critical to our analysis. [*Id.* at 6-7 (footnote omitted).]

The court below gave short shrift to petitioners' Free Exercise Clause claim. The Maine voucher program does not violate that Clause, the court found, because " '[t]he fact that government cannot exact from [a citizen] a surrender of one iota of [her] religious scruples does not, of course, mean that [she] can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " *Id.* at 14 (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)) (brackets by court). Nor was the court below at all impressed by petitioners' Establishment Clause claim, noting that that Clause "has no role in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion." Pet. App. at 17.

Although the Maine Supreme Court concluded that petitioners' claim that the voucher program violated the Equal Protection Clause "present[ed] an important issue worthy of evaluation," *id.* at 19, it ultimately rejected that claim as well. The court's stated reason was that Maine has a constitutionally-valid justification for excluding sectarian private schools from its voucher program, inasmuch as *the inclusion* of such schools in the program would violate the Establishment Clause. *Id.* at 18-46.

Justice Clifford dissented from that portion of the lower court's ruling rejecting petitioners' Equal Protection Clause claim, being of the view that "a more narrowly tailored tuition program could be created that would lessen the discrimination based on religion, while still complying with the Establishment Clause." *Id.* at 53.

C. The First Circuit's Subsequent Decision in *Strout v. Albanese*

Approximately one month after the Maine Supreme Court's decision in this case, the United States Court of Appeals for the First Circuit decided *Strout v. Albanese,* 178 F.3d 57 (1st Cir. 1999), which involved a virtually-identical (and contemporaneous) constitutional challenge to Maine's voucher program.[3] The First Circuit majority saw the case in precisely the same terms as did the Maine Supreme Court, and ruled accordingly. *See* 178 F.3d at 60-65. But Judge Campbell wrote separately to state his view that—in rejecting plaintiffs' Equal Protection Clause claim—there was "no need whatever to reach out and decide the thorny . . . issue" of whether the inclusion of sectarian private schools in the voucher program would violate the Establishment Clause. *Id.* at 68 (Campbell, J., concurring). In explaining that view, Judge Campbell stated:

> I see the Maine Legislature, in 1981 and to this moment, as having rationally and prudently excluded sectarian schools because of a well-founded concern —whether or not ultimately correct—that to do otherwise will or may violate the establishment clause.

---

[3] The one notable difference was that in the federal court lawsuit plaintiffs added substantive due process and free speech claims to their Free Exercise. Establishment, and Equal Protection Clause claims. These additional claims were rejected "out of hand" by the First Circuit. 178 F.3d at 65-66.

> The existence of that fear is rational enough, I think, to meet equal protection (and free exercise) requirements, however defined. [*Id.*]

REASONS FOR DENYING THE WRIT

THE INSTANT CASE DOES NOT PROVIDE AN APPROPRIATE VEHICLE FOR RESOLVING THE ESTABLISHMENT CLAUSE QUESTION RAISED BY VOUCHER PROGRAMS THAT INCLUDE SECTARIAN PRIVATE SCHOOLS

Petitioners indicate that "school choice programs" that allow pupils to attend private schools—including sectarian private schools—at taxpayer expense recently have been enacted in Wisconsin, Ohio and Florida, Petition for a Writ of Certiorari ("Pet.") at 22-23, that "serious [*albeit* unsuccessful] efforts to enact school choice programs occurred in a number of other states this past year, including Pennsylvania, New Mexico, and Texas," *id.* at 23, and that "concerns" about whether "the inclusion of religious choices is constitutionally permissible . . . make it difficult for conscientious legislators to know what to do." *Id.* Petitioners conclude that "[t]he conflicting jurisprudence among various state and federal courts on [the] important question [of whether and under what circumstances public funds can be used to pay for pupils to attend sectarian private schools] necessitates resolution by this Court." *Id.* at 25.

There can be no serious dispute on this latter score. Indeed, in the Petition for a Writ of Certiorari that was filed with this Court on August 31, 1998 in *Jackson v. Benson,* No. 98-376 ("*Jackson* Pet."), the *opponents* of the Wisconsin voucher program asserted that resolution of this question "is central both to the development of this Court's Establishment Clause jurisprudence and to

the formulation of this nation's education policy . . . ." *Jackson* Pet. at 9. The dispositive question for present purposes, however, is not whether this Court should resolve the important Establishment Clause question raised by voucher programs that include sectarian private schools. We submit that the answer to this question clearly is "yes."[4] The question is rather whether the instant case provides an appropriate vehicle for doing so. As we demonstrate below, the answer to this latter question just as clearly is "no."

A. This Case Does Not Involve A Program Pursuant To Which Public Funds Are Used To Pay For A Sectarian Private School Education

We begin with the fact that—unlike *Jackson v. Benson*, and the Ohio and Florida cases referenced in the Petition, *see* Pet. at 15-16, 23—this case does not even involve a program pursuant to which public funds are used to pay for pupils to attend sectarian private schools, and, as such, does not directly present the question of whether such a program violates the Establishment Clause. The court below put the point as follows:

> [W]e are presented with the opposite question: whether a tuition program that *specifically excludes religious schools* violates any of three constitutional provisions: the Establishment Clause of the First Amendment; the Free Exercise Clause of the First

---

[4] This Court already addressed this question in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), striking down on Establishment Clause grounds a New York voucher program. In suggesting that there is a need for further guidance from this Court, it was the position of petitioners in *Jackson v. Benson* and of respondents here that this Court should grant review in order to reaffirm that *Nyquist* is still good law.

> Amendment; or the Equal Protection Clause of the Fourteenth Amendment. [Pet. App. at 7 (emphasis added).]

The consequences of this distinction are, as the court below recognized, "critical to our analysis." *Id.* Because the Maine statute does *not* provide for public funding of sectarian private school education, there is no basis for applying the largely fact-based criteria that were found to be determinative by this Court in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973)—*i.e.*, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . and finally, the statute must not foster 'an excessive government entanglement with religion,'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Nor is there a factual record on the basis of which to determine whether and to what extent such a use of public funds is in compliance with the "safeguards" that informed this Court's decision in *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

The court below put this point in sharp focus with regard to the question of excessive entanglement:

> We could not, however, make a final determination on this issue on the record before us. Because the tuition program has not included religious schools for the past 18 years and has therefore not encountered problems of entanglement, neither the rules nor the practical application of the statutory requirements were addressed in detail in the Superior Court.[35] [Pet. App. at 43.]

In the accompanying footnote—fn. 35—the court added:

> Ordinarily, a court undertaking an entanglement analysis does so in the context of reviewing a state

> program that *does provide* aid to a religious institution. [(Emphasis in original).]

Even the dissenting Justice in the court below (Justice Clifford) acknowledged the need to look to the specific terms under which public funds are made available to pay for a sectarian school education in order to determine whether "Establishment Clause violations may be avoided by a tuition program that does not entirely exclude religious schools," suggesting that the answer might be "yes" if the voucher program "provides more limited tuition with reasonable restrictions conditioning the use of that aid." Pet. App. at 52. To illustrate the point, Justice Clifford opined that "[a] tuition program with similar or greater restrictions and conditions [than the voucher program sustained by the Wisconsin Supreme Court in *Jackson v. Benson*] could be fashioned within the framework of the current [Maine] statute with very little effort on the part of the State." Pet. App. at 53. Justice Clifford outlined this hypothetical voucher program as follows:

> Tuition in less substantial amounts could be authorized to benefit parents of children in religious schools. The tuition aid could be directed through the parents to avoid restrictions on direct aid and the State could require participating schools to accept an "opt-out" provision. In addition to the restrictions set forth in the Wisconsin program, the State could adopt reasonable conditions and restrictions on the use of the State aid, insuring that the moneys would not be used to directly subsidize the religious functions of the schools, avoiding both direct aid of religion and excessive entanglement of the State in religion. [*Id.*]

The important point for present purposes is not whether Justice Clifford's hypothetical voucher program would

pass constitutional muster, but his recognition of the fact that this question cannot be answered in the abstract.[5]

Petitioners, on the other hand, fail to grasp this critical distinction between what is and what might be. Thus, they repeatedly refer in their Petition not to the Maine voucher program that in fact is before this Court, but rather to the program that would be at issue *if the Maine Legislature had decided to include sectarian private schools*, and the latter program had been challenged as violative of the Establishment Clause. *See, e.g.*, Pet. at 12 ("The Maine program, however, is similar to the programs in *Everson* and *Allen* in that it benefits all students and epitomizes precisely the sort of neutral program this Court made a specific point of not foreclosing in *Nyquist*."); *id.* at 18 ("Maine's tuitioning system is the epitome of such a neutral, choice-driven system . . . .").

We need not belabor the point. The answer to the question of whether and under what circumstances public funds can be used to pay for a sectarian private school education is, as petitioners assert, "central both to the continued development of this Court's First Amendment jurisprudence and to vital efforts being undertaken in many states to improve elementary and secondary education." Pet. at 11. *See also Jackson* Pet. at 9 ("That question is central both to the development of this Court's Establishment Clause jurisprudence and to the formulation of this nation's edu-

---

[5] Compare the following observation in the majority opinion below:

> While it may be possible for the Legislature to craft a program that would allow parents greater flexibility in choosing private schools for their children, the current program could not easily be tailored to include religious schools without addressing significant problems of entanglement or the advancement of religion. *It is up to the Legislature, not the courts, to determine whether and how to attempt to structure such a program.*[1] [Pet. App. at 45 (emphasis added).]

cation policy . . . ."). But this important constitutional question should be answered in a case that involves a program that *does in fact* provide financial aid to sectarian private schools, and that comes to this Court with an appropriate factual record for constitutional analysis. This is clearly not such a case.

B. The Conclusion Of The Court Below That The Inclusion Of Sectarian Private Schools In Maine's Voucher Program Would Violate The Establishment Clause Was Not Necessary To The Disposition—And Rejection —Of Petitioners' Equal Protection Clause Claim

Petitioners formulate the Question Presented as follows:

> Does the establishment clause of the U.S. Constitution require the exclusion of religious schools from Maine's tuitioning program, which allows parents to choose from an array of public and private schools for their children's education?

This formulation is at best misleading because it implies that the "holding" of the Maine Supreme Court is bottomed on the Establishment Clause, and that the Petition seeks review of that holding. But this is not so, and it is important to make clear precisely how the Establishment Clause factors into the lower court's decision.

Petitioners contended in the court below, *inter alia*, that the Maine voucher program violates the Establishment Clause because it excludes sectarian private schools. The Maine Supreme Court summarily disposed of that claim, holding that that Clause "has no role in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion." Pet. App. at 17. That is the *only Establishment Clause hold-*

ing in this case, and petitioners do not challenge it before this Court.[6]

The Establishment Clause also came into play in the lower court's analysis of petitioners' Equal Protection Clause claim. The court rejected that claim because it concluded that Maine had a constitutionally-valid justification for excluding sectarian private schools from its voucher program—*i.e.*, that the inclusion of such schools would violate the Establishment Clause. Pet. App. at 18-46. Petitioners do not—at least in terms—ask this Court to review the lower court's rejection of their Equal Protection Clause claim, but rather to determine whether the *reason* given by the court for that rejection was proper. We submit that this Court should deny that request, inasmuch as the position taken by the court below *vis-à-vis* the Establishment Clause was not necessary to its disposition—and rejection—of petitioners' Equal Protection Clause claim.

1. Although the bulk of the lower court's decision was devoted to petitioners' Equal Protection Clause claim, *see* Pet. App. at 18-45, its entire analysis was conducted in an *arguendo* context. The court noted at the outset that petitioners' "argument turns . . . on the fact that the State chooses to include private schools in the tuition program but excludes private religious schools." *Id.* at 19. The court then indicated that petitioners lacked standing to make this argument, and that this in and of itself was sufficient reason to reject their Equal Protection Clause claim:

> In essence, the parents claim that Cheverus [High School] is treated differently because it is a religious school, not that the parents are treated differently

---

[6] Petitioners likewise do not challenge the lower court's holding that their Free Exercise Clause claim is meritless.

> because they are Catholic. Ordinarily, the Equal Protection claim here would be asserted, not by potential clients of the excluded institution, but by the school itself.[ ] Cheverus, however, is not party to this action. [*Id.*]

Because the court "conclude[d] that the parents present an important issue worthy of evaluation," it nonetheless proceeded to "assess the parents' Equal Protection argument assuming *arguendo* that the parents' lack of opportunity to have the State pay the tuition for their children to attend a private religious school results in *their own* disparate treatment on the basis of their religion." *Id.* (emphasis in original).

In short, the conclusion of the court below that petitioners lacked standing to make their Equal Protection Clause argument provides an independent basis for sustaining the court's judgment.

2. Even if we go further, and consider the lower court's Equal Protection Clause analysis on its own terms, the court's determination that the inclusion of sectarian private schools in Maine's voucher program would violate the Establishment Clause—although correct—was not in any event necessary to the disposition—and rejection—of petitioners' Equal Protection Clause claim. As we now show, that claim should have been rejected—as we urged below—on the basis of this Court's summary affirmances of the three-judge district court decisions in *Brusca v. Missouri*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972), and *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974).[7]

---

[7] A summary disposition by this Court is, of course, no less of a controlling precedent in the lower courts then a plenary disposition. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Brusca involved a federal constitutional challenge to provisions of the Missouri Constitution and implementing statutes providing for the funding of a system of free public education, while at the same time barring all forms of tuition assistance to parents wishing to send their children to sectarian private schools. 332 F. Supp. at 276. Like petitioners here, the parents in *Brusca* argued that tuition assistance by the State would not violate the Establishment Clause, and that, therefore, the State "den[ied] them the equal protection of the laws" by refusing such assistance while providing its equivalent to parents utilizing the public schools. *Id.* The *Brusca* court rejected this analytical approach, stating that "[t]he issue presented . . . is not so much what Missouri *may* do [consistent with the Establishment Clause,] but what it *must* do in aid of religious education." *Id.* (emphasis in original). Viewing the issue in those terms, the court summarily rejected the parents' Equal Protection Clause claim, finding that traditional rational basis scrutiny applied, and that there was "nothing arbitrary or unreasonable in the determination of the State to deny its funds to sectarian schools or for religious instruction." *Id.* at 279.

Luetkemeyer involved a constitutional challenge to "those statutes of the State of Missouri which provide for transportation of public school pupils to and from school but which do not provide like transportation for the pupils of church-related schools." 364 F. Supp. at 377. Given this Court's decision in *Everson v. Board of Education*, 330 U.S. 1 (1947), it was conceded *in Leutkemeyer* that the Establishment Clause did not prevent Missouri from providing "like transportation for the pupils of church-related schools." As in *Brusca*, however, the *Luetkemeyer* court found that cases defining the prohibitive scope of the Establishment Clause "did not relate to the [Equal Protection Clause] question presented," inas-

much as "[p]rinciples which state what a State *may* do may not properly be read as a command to what a State *must* do." 364 F. Supp. at 381 (emphasis in original). And, like the *Brusca* court, the *Luetkemeyer* court rejected the parents' Equal Protection Clause claim. Applying rational basis scrutiny, the court found nothing "irrational" about "the State of Missouri's decision to promote the separation of church and state by refusing to provide school bus transportation to church-sponsored school pupils when it does provide that service to public school pupils." *Id.* at 382.

Brusca and *Luetkemeyer* stand for the proposition that a state constitutional or statutory provision excluding sectarian private schools from an otherwise "neutral" educational program does *not* run afoul of the Equal Protection Clause—without regard to whether a different state constitutional or statutory provision including sectarian private schools in the program would violate the Establishment Clause.[8] That being so, the decision of the court below rejecting petitioners' Equal Protection Clause claim was correct, without regard to the correctness *vel non* of the Establishment Clause reasoning that led the court to that decision.

---

[8] Contrary to the finding of the court below, *see* Pet. App. at 19-22, *Brusca* and *Luetkemeyer* also stand for the proposition that rational basis scrutiny applies in this context. *Compare Strout, supra*, 178 F.3d at 67 ("Because plaintiffs' attempt to use the establishment clause as a sword fails, and because the Maine statute does not, for the reasons stated by my colleagues, violate the free exercise clause, no fundamental right is implicated here for equal protection purposes. Thus, the proper level of scrutiny under the equal protection clause is the most deferential—rational basis review.") (Campbell, J., concurring). This point is particularly well-taken here in light of the lower court's discussion of standing, and its conclusion that petitioners themselves have *not* been treated differently on the basis of their religion. Pet. App. at 9.

Petitioners contend that resolution of the Establishment Clause question presented *was* necessary to the lower court's Equal Protection Clause decision because—as that court found—the *actual* legislative purpose behind the "1981 exclusion" of sectarian private schools from the Maine voucher program was "avoiding an establishment clause violation." Pet. at 11 & n.11 (citing Pet. App. at 24). But that contention is without merit.

As a general rule, a state statute will survive rational basis scrutiny under the Equal Protection Clause if there is any "conceivable" legislative purpose that supports the challenged classification, and it is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-15 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 364 (1973)). An exception to that rule exists when the legislature has " 'specifically declared [its] purpose' " and *that* declared purpose is found to have been irrational, *see Nordlinger v. Hahn*, 505 U.S. 1, 16 n.7 (1992) (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959)), but that exception does not save petitioners here. Petitioners do not—and cannot—claim that *the 1981 Maine Legislature* acted "irrationally" when it excluded sectarian private schools from the voucher program for the purpose of avoiding an Establishment Clause violation. As the court below found:

> The Legislature enacted the exclusion in 1981 in direct response to developments in Establishment Clause jurisprudence during the 1970's. Placing those developments in a historical context demonstrates that the Legislature had little choice but to adopt the exclusion if it chose to continue its tuition program. [Pet. App. at 24.]

Petitioners' Equal Protection Clause claim, simply put, is that the exclusion of sectarian private schools from Maine's voucher program *no longer* has a rational basis *today*, in light of a post-1981 line of Establishment Clause decisions by this Court culminating in *Agostini v. Felton*, 521 U.S. 203 (1997). *See* Pet. at 13; *see also* Pet. App. at 28 ("The parents urge us to conclude . . . that recent changes in the Supreme Court's analysis of the Establishment Clause have resulted in the elimination of the necessity for the religious exclusion."). In this context, the only *actual* legislative purposes that conceivably could be relevant to the Equal Protection Clause inquiry are the purposes of *the current Maine Legislature* in *maintaining* the exclusion of sectarian private schools in the face of these post-1981 jurisprudential developments. But so far as the record shows, the current Maine Legislature has made no declaration of its actual purposes in that regard.

It is possible, of course, to speculate as to what those actual purposes might be—as we do in the margin.[9] But

---

[9] One possibility is that the Maine Legislature's attitude regarding the separation of church and state has changed since 1981, to the point where the Legislature does not wish, as a policy matter, to include sectarian private schools in the voucher program, even assuming *arguendo* that to do so no longer would violate the Establishment Clause. *Cf. Brusca*, 332 F. Supp. at 277; *Leutkemeyer*, 364 F. Supp. at 383. A second possibility is that the Maine Legislature has analyzed this Court's recent Establishment Clause cases and is of the view that those cases do not indicate that sectarian private schools could be included in the program consistent with the Establishment Clause. And, a third possibility is that the Maine Legislature has analyzed the recent cases and considers the Establishment Clause issue as a close one, but chooses not to have the Maine voucher program be the "test case" on that issue.

Petitioners assert that "[i]n the absence of any need to avoid a violation of the establishment clause, Maine lacks any legitimate basis for interfering with families' ability to choose a religious education for their own children." Pet. at 22. Petitioners once again miss the point. Maine is not in any sense "interfering with

in the absence of record evidence on that point, the only question that genuinely is relevant to the disposition of petitioners' Equal Protection Clause claim is whether there is *any "conceivable" rational justification* for Maine's continued exclusion of sectarian private schools from its voucher program. *Brusca* and *Leutkemeyer* definitively answer that question "yes." That being so, the court below should summarily have rejected petitioners' Equal Protection Clause claim, without reaching out to decide whether the inclusion of sectarian private schools in the voucher program would run afoul of the Establishment Clause.[10]

* * * *

The question of whether and under what circumstances public funds may be used to pay for pupils to attend sectarian private schools without violating the Establishment Clause is an important one—too important, we submit, to be addressed by this Court in the muddled, hypothetical posture in which it is presented here. There are, as petitioners point out, several pending cases chal-

---

families' ability to choose a religious education for their own children." The question is whether—apart from the "need to avoid a violation of the establishment clause"—the State has "any legitimate basis for" refusing *to pay for* such a religious education. As we demonstrate above and in text, it most assuredly does.

[10] Although the foregoing analysis leads us to the same conclusion as Judge Campbell in *Strout v. Albanese*—*i.e.*, there is "no need whatever" to decide the Establishment Clause question presented, 178 F.3d at 68—we feel obliged in the interest of completeness to note that even Judge Campbell missed the point to a degree. Judge Campbell "s[aw] the Maine Legislature, in 1981 *and to this moment*," as being motivated by a wholly rational fear that the inclusion of sectarian private schools in the voucher program would or might violate the Establishment Clause. *Supra* p. 5 (emphasis added). It is, of course, possible that that is the current Maine Legislature's actual motive, but there are other possibilities as well, and the record is silent on the point. *See supra* p. 17 & n.9.

lenging on Establishment Clause grounds state programs that do provide public funds to pay for sectarian school education, and that present the Establishment Clause question in direct and pristine form. *See Pet.* at 22-24.[11] One need not be omniscient to recognize that one or more of these pending cases is likely to provide this Court with a far more appropriate vehicle for clarifying the constitutional parameters of the unfolding debate over voucher programs.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT H. CHANIN *
JOHN M. WEST
ANDREW D. ROTH
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

DONALD F. FONTAINE
FONTAINE & BEAL, P.A.
482 Congress Street
P.O. Box 7590
Portland, Maine 04112
(207) 879-1879

JEFFREY THALER
BERNSTEIN, SHUR, SAWYER & NELSON
100 Middle Street
Portland, Maine 04101
(207) 774-1200

* Counsel of Record

---

11 Contemporaneously with the filing of the Petition, two additional lawsuits were filed in federal district court challenging—strictly on Establishment Clause grounds—Ohio's "reauthoriz[ation]" (Pet. at 16 n.15) of its voucher program for the City of Cleveland. *See Simmons-Harris v. Zelman*, No. 99-1740 (July 20, 1999 N.D. Ohio); *Gatton v. Zelman*, No. 99-1818 (July 29, 1999 N.D. Ohio). These two cases were consolidated, and on August 24, 1999, the federal district court preliminarily enjoined implementation of the new program. On August 27, 1999, the district court issued a partial stay of the preliminary injunction, and expedited the hearing on a permanent injunction.

Supreme Court, U.S.
FILED
AUG 30 1999
CLERK

No. 99-163

In The

Supreme Court of the United States

ROBERT BAGLEY, et al.,

Petitioner,

v.

RAYMOND SCHOOL DISTRICT, et al.,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* TEXAS JUSTICE FOUNDATION; CENTER FOR EDUCATION REFORM; CITIZENS AGAINST GOVERNMENT WASTE; LIBERTY LEGAL INSTITUTE; REPUBLICAN NATIONAL HISPANIC ASSEMBLY OF TEXAS; SCHOOL FOR EDUCATIONAL ENRICHMENT; TEXAS PUBLIC POLICY FOUNDATION; AND TOWARD TRADITION IN SUPPORT OF THE PETITION

ALLAN PARKER
Counsel of Record
Texas Bar No. 15505500
CLAYTON TROTTER
Texas Bar No. 20240500
8122 Datapoint, Suite 812
San Antonio, TX 78229
Phone: (210) 614-7157
Fax: (210) 614-6656
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Establishment Clause of the First Amendment to the U.S. Constitution forbid the inclusion of faith-based schools in a tax-funded tuition program?

MOTION OF TEXAS JUSTICE FOUNDATION, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

TO THE HONORABLE COURT:

COMES NOW, TEXAS JUSTICE FOUNDATION (TJF) and files this Motion for Leave to File Brief as Amicus Curiae on its own behalf and that of other Amici.

The TEXAS JUSTICE FOUNDATION is a 501(c)(3) non-profit law firm that has as its mission the protection of free markets, religious liberty, parental rights and limited government. The Texas Justice Foundation seeks, through litigation and education, to protect the rights essential to the preservation of American liberty.

A party may seek leave of this Court to file a brief as amicus curiae on issues raised by the case. Rule 37.2(b). Accordingly, the Texas Justice Foundation files this amicus brief because of its interest in parental rights and in government neutrality regarding issues of religious belief. The exclusion of faith-based schools from government educational programs is a form of invidious discrimination prohibited, rather than required, by the First Amendment. Given the religious beliefs of the majority of Americans, governmental policies which seem to imply hostility toward a religious world view are likely to incite, rather than avoid, division and polarization.

The following parties have consented to the filing of this Amicus Brief: Petitioners – Cynthia and Robert Bagley, Gary and Cynthia St. Pierre, Dennis and Patricia Cole, Ricky and Mary Thornton, and Jack and Stacia Fitch; Respondents – Maine Department of Education and its Commissioner J. Duke Albanese, Timothy Humphrey, Jane Humphrey, Frank McDermott, Timothy Morin, Joan

Morin, Timothy Fitzgerald, Ken Williams, Barbara Williams and the Maine Civil Liberties Union. The following parties have not responded to the Texas Justice Foundation's request for consent: Raymond School Department.

The TEXAS JUSTICE FOUNDATION therefore moves this Court for leave to file a brief as Amicus Curiae, and asks this Court to accept for filing the attached brief of Amicus Curiae TEXAS JUSTICE FOUNDATION in support of the petition for Writ of Certiorari on this the 30th day of August, 1999.

Respectfully submitted,

ALLAN E. PARKER, JR.
Texas Bar No. 15505500
CLAYTON TROTTER
Texas Bar No. 20240500
8122 Datapoint, Suite 812
San Antonio, TX 78229
Phone: (210) 614-7157
Fax: (210) 614-6656
Counsel for Amicus Curiae
Texas Justice Foundation

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. Maine's exclusion of religious schools from the tuitioning program is a denial of equal protection based on religion, subject to strict scrutiny 6

II. The Establishment Clause does not forbid Maine from including religious schools in its "tuitioning" program 9

A. Inclusion of religious schools in Maine's voucher program would not compromise its secular purpose. The program would remain "a general program not skewed toward religion." 9

B. Inclusion would not have the primary effect of advancing religion, since aid would reach religious schools only as a result of the "private and independent choices of aid recipients." 10

C. Inclusion of religious schools would not lead to excessive entanglement between government and the church 13

III. Maine's decision to fund secular educational speech by private schools but not theocentric educational speech is viewpoint discrimination forbidden by the First Amendment 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Aguilar v. Felton, 473 U.S. 402 (1984); *overr'd by Agostini v. Felton*, 521 U.S. 203 (1997) 13

Bagley v. Raymond School Department, 728 A.2d 127 (Maine 1999) 4, 5, 11

Barnett v. West Virginia, 319 U.S. 624 (1943) 14

Brusca v. Missouri ex rel. State Board of Education, 332 F. Supp. 275, *aff'd*, 405 U.S. 1050 (1972)..... 6

Committee for Public Education and Religious Freedom v. Nyquist, 413 U.S. 756 (1973)..... 11

Employment Division, Dept. of Human Services of Oregon v. Smith, 494 U.S. 872 (1990).....5, 8

Jackson v. Benson, 578 N.W.2d 602 (Wisconsin 1998) ...4, 5

Lemon v. Kurtzman, 403 U.S. 602 (1971)..... 13

McDaniel v. Paty, 435 U.S. 618 (1978)..... 8

Meek v. Pittinger, 421 U.S. 349 (1975) 11, 13

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 14

Perry v. Sindermann, 408 U.S. 593 (1972)..... 7

Pierce v. Society of Sisters, 268 U.S. 510 (1925).....14, 16

Rosenberger v. Rector, 515 U.S. 819 (1995) 6, 14, 15

Strout v. Albanese, 1999 WL 329272 (1st Cir.(Me.)) 5

School District of Grand Rapids v. Ball, 473 U.S. 373 (1985) 11, 12

Simmons-Harris v. Goff, 1999 WL 349689 (Ohio) 5

TABLE OF AUTHORITIES – Continued

Page

Torcaso v. Watkins, 367 U.S. 488 (1961) 7, 8

Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) 6, 9, 10

Zobrest v. Catalina Hills School District, 509 U.S. 1 (1993) 5, 10

Zorach v. Clauson, 343 U.S. 306 (1951) 12

STATUTES

Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. Sec. 604a 11

Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937 15

BRIEF OF *AMICI CURIAE* TEXAS JUSTICE FOUNDATION AND OTHERS IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of the Petitioner.[1]

INTEREST OF THE *AMICI CURIAE*

The *Center for Education Reform* is a national, non-profit advocacy organization founded in 1993 to provide support for fundamental reforms to public schools. CER seeks to ensure that ideas critical to education reform are identified, understood and implemented. CER works to build coalitions with diverse constituencies to improve access, accountability and assessment and to help restore educational excellence and equity. The Center believes that inclusion of faith-based schools in voucher programs will expand and diversify educational opportunities for children.

Citizens Against Government Waste (CAGW) is a 600,000 member, private, non-partisan, non-profit organization dedicated to educating Americans about the waste, mismanagement and inefficiency in the federal government. Founded in 1984 by the late industrialist J. Peter Grace and syndicated columnist Jack Anderson, CAGW is the legacy of the President's Private Sector Survey on

[1] No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* and their counsel contributed financially to the preparation of this brief.

Cost Control, also known as the Grace Commission. CAGW has long favored vouchers because they bring competition into the educational system and increase efficiency, ultimately saving taxpayer dollars.

Liberty Legal Institute is a legal organization specializing in the defense of religious freedoms and First and Fourteenth Amendment rights. The Institute is very concerned about attempts to misuse the Establishment Clause to justify discrimination against religious citizens and groups. Such exclusion of religious groups is central to the instant case, making it of great interest to the Institute.

The *Republican National Hispanic Assembly of Texas* is a non-profit, political organization composed of 14 County Chapters of the RNHA throughout Texas. RNHA chapters are local organizations of mostly Hispanic Americans who espouse limited government, lower taxes, a strong national defense, and school vouchers. The RNHA of Texas believes that the inclusion of religious schools in voucher programs is not prohibited by the First Amendment, and urges this Court to grant certiorari to the Petitioners.

The *School For Educational Enrichment* is a secular private school in El Paso, Texas. The School believes that many religious schools offer excellent academic services, and that educational reform will require the participation of all segments of our society.

The *Texas Conservative Coalition* (TCC) is an organization *of* and *for* state legislators committed to shaping public policy through the promotion of conservative principles – limited government, individual liberties, free

enterprise and traditional family values. It is the position of the Coalition that parents have a fundamental right to direct the education and upbringing of their children. A ruling for the Petitioners in this case would enhance a parent's right to decide which school can most appropriately educate their child.

The *Texas Justice Foundation* is a 501(c)(3) non-profit organization which provides free legal representation in landmark cases involving limited government, free markets, private property, and parental rights. The Foundation seeks, through litigation and education, to protect the fundamental freedoms essential to the preservation of American society. The Foundation favors parental choice in education, and believes that the exclusion of faith-based schools from taxpayer funded tuition programs is impermissible religious discrimination.

The *Texas Public Policy Foundation* is a 501(c)(3) non-profit, non-partisan research institute. TPPF conducts public policy research and presents its findings to policy makers and the general public. The Foundation believes that the Constitution permits the inclusion of faith-based schools in voucher programs, and that such schools often offer the best educational options for children in economically marginalized areas.

Toward Tradition is a non-partisan movement of Jews allied with Christians who want to apply traditional ideas to America's cultural, political and economic life. Jewish tradition teaches that parents, not government, have the primary responsibility for educating their children. We believe that government should pursue policies that encourage the greatest possible parental control over

their children's education. For this reason, we believe that religious schools should not be excluded from programs such as Maine's "tuitioning" program.

SUMMARY OF THE ARGUMENT

Amici respectfully submit this brief to urge the Court to hear the appeal of the Petitioners. The Maine Supreme Judicial Court's application of the Establishment Clause in this case squarely conflicts with that of this Court and of other state supreme courts which have applied its precedents. The court below has erroneously held that the First Amendment of the U.S. Constitution requires the exclusion of faith-based schools from state-funded, neutral tuition programs. The Establishment Clause does not require such exclusion. In fact, such exclusion is facially unconstitutional viewpoint discrimination.

The split between state supreme courts on this question is best illustrated by comparing the holdings of the court below to the holding of the Wisconsin Supreme Court in *Jackson v. Benson*, 578 N.W.2d 602 (Wisc. 1998), *cert. denied*, 119 S.Ct. 466. Maine's Supreme Judicial Court held unequivocally that " . . . [I]n the absence of that exclusion [of religious schools], Maine's tuition program would violate the Establishment Clause." *Bagley v. Raymond School Department*, 728 A.2d 127, 143. (Maine 1999). However, the Supreme Court of Wisconsin, ruling on a similar program which welcomes the participation of religious schools, ruled just as unequivocally, "Does the amended Milwaukee Parental Choice Program violate the Establishment Clause of the First Amendment? . . . We

conclude that it does not." *Jackson v. Benson*, 578 N.W.2d 602, 607 (Wisconsin 1998).

Recently the U.S. Court of Appeals for the First Circuit, in a case which parallels this one, held that the Establishment Clause required Maine's exclusion of religious schools. *Strout v. Albanese*, 1999 WL 329272 (1st Cir.(Me.)) However, the Supreme Court of Ohio recently held that inclusion of religious schools in an experimental voucher program did not violate the Establishment Clause. *Simmons-Harris v. Goff*, 1999 WL 349689 (Ohio). There is a pressing need for the Court to resolve this conflict and give courts and legislatures a bright-line rule. *Bagley* is the ideal opportunity for the Court to do so, since its holding turns largely on the Establishment Clause question. "The state does not dispute that its *only* justification for excluding religious schools from the tuition program was compliance with the Establishment Clause." *Bagley*, at 131. (emphasis added).

First, the exclusion of religious schools from Maine's voucher program is, on its face, a denial of equal protection based on religion. A government policy which discriminates according to religion is unconstitutional unless it is narrowly tailored to serve a compelling governmental interest. *Employment Div., Dept. of Human Services of Oregon v. Smith*, 494 U.S. 872, 888 n.3 (1990).

Second, no such compelling interest exists, because the Establishment Clause does not require that faith-based schools be excluded from publicly funded voucher programs. In *Zobrest v. Catalina Hills School District*, 509 U.S.1 (1993), this Court held that the Establishment Clause is not offended when parental choice causes faith-

based schools to benefit from a general program not skewed toward religion. In *Witters v Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), this court reiterated that the Constitution permits governmental benefits to students in faith-based schools provided that such payment results from the independent and private choices of aid recipients.

Third, the Free Speech clause forbids the exclusion of religious schools from tax-funded programs open to all other non-governmental schools. This Court held in *Rosenberger v. Rector*, 515 U.S. 819 (1995), that the exclusion of religious voices from a state-created limited public forum is impermissible viewpoint discrimination. Maine has chosen to create a limited public forum for non-governmental educational speech through its "tuitioning" program, and its decision to subsidize educational speech by secular private schools but not religious private schools violates the rule of *Rosenberger*.

ARGUMENT

I. Maine's exclusion of religious schools from the tuitioning program was a denial of equal protection based on religion, subject to strict scrutiny.

Respondents caricature the position of the Petitioners as a claim that the right of free exercise of religion equals a right to subsidy of religion. Therefore, Respondents cite *Brusca v. Missouri ex rel. State Board of Educ.*, 332 F. Supp. 275, *aff'd*, 405 U.S. 1050 (1972). In *Brusca*, the plaintiffs argued that the Constitution required Missouri to fund all of that state's sectarian schools. The Bagleys do not claim

anything resembling the sweeping entitlements rejected in *Brusca*. They merely claim that, having set up a tuition program which includes private schools, Maine cannot discriminate among those private schools on the constitutionally impermissible grounds of religion. As this court stated in *Perry v. Sindermann:*

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest."

Sindermann, 408 U.S. 593, 597 (1972).

An analogous question arose in *Torcaso v. Watkins,* 367 U.S. 488 (1961). Torcaso, an atheist, challenged a Maryland statute that required a belief in God as a qualification for public office. Maryland argued that the state was not *compelling* Torcaso to pretend belief, since holding public office was voluntary. The Court replied that "The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Torcaso,* at 496.

The State of Maine may have had no obligation to include private schools in this tuition program at all. However, having chosen to include private schools, the state does have an obligation to refrain from discriminating between them on the constitutionally impermissible

basis of religion. The 1981 amendment to M.R.S.A. established a religious test – or, rather, an irreligious test – for private schools to participate. This is, to paraphrase *Torcaso*, a state-imposed criteria forbidden by the Constitution.

Petitioners and *amici* contend that Maine's exclusion of sectarian schools is a neutral law of general applicability and therefore need only meet the rational basis test under the rule of *Employment Div., Dept. of Human Services of Oregon v. Smith,* 494 U.S. 872 (1990). However, a policy is not neutral simply because it disfavors all religions equally. The exclusion's acknowledged purpose was to discriminate according to religious classification. It is, on its face, neither neutral nor of general applicability. "[T]he exclusion manifests patent hostility toward, not neutrality respecting, religion." *McDaniel v. Paty,* 435 U.S. 618, 636 (1978) (States cannot bar clergy from public office).

This court has held that "Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion." *Smith,* 494 U.S. at 888, n.3 (internal cites omitted). A law which facially discriminates on a religious basis is unconstitutional unless it is narrowly tailored to serve a compelling governmental interest. The court below held that the need to avoid violation of the Establishment Clause was such an interest, but, as shown below, inclusion of religious schools on a neutral basis would not violate the Establishment Clause.

II. The Establishment Clause does not forbid Maine to include religious schools in its "tuitioning" program.

A. Inclusion of religious schools in Maine's voucher program would not compromise its secular purpose. The program would remain "a general program not skewed toward religion."

Maine's secular purpose of guaranteeing a secondary education to every child would not be compromised by inclusion of religious schools on a neutral basis. The Bagleys seek no general subsidy for religious school systems, nor do they seek impermissible financial incentives for parents to send their children to religious, rather than secular schools. They ask only that the program be "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Witters v. Washington Dept. of Social Services for the Blind*, 474 U.S. 481, 485 (1985).

Maine's secular public interest in educating children is actually disserved when otherwise eligible schools are excluded on religious grounds. The Constitution does not require this discrimination. Many faith-based schools provide educational services that, by objective standards, are competitive, if not excellent. For example, several of the parents who were original plaintiffs in this action wanted to send their children to Cheverus not because of its Catholic orientation but because of the school's reputation for academic excellence and modest tuition. It is hardly in the public interest to exclude such high-performing schools from participation. Since the "tuitioning" program is limited to rural areas where educational

options are limited, exclusion of faith-based schools may deny students their best and most affordable options.

B. Inclusion would not have the primary effect of advancing religion, since aid would reach religious schools only as a result of the "private and independent choices of aid recipients."

The Court has held that participation of religious schools in state educational programs does not have the primary effect of advancing religion provided the aid reaches the religious school "as a result of the genuinely independent and private choices of the aid recipients", and "creates no financial incentive for students to undertake sectarian education". *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488. (Establishment Clause permits recipient to use state grant at a seminary); *Zobrest v. Catalina Hills School District*, 509 U.S. 1, 9 (1993) (Establishment Clause permits state to provide sign language interpreter for parochial school student). Like the vocational grants at issue in *Witters*, the beneficiaries of Maine's program are the students, not the school. The grants provide direct support for the education of children, not for the operation of the schools chosen by their parents.

Sectarian schools would receive only those funds which the state allots for the education of the students attending them under the auspices of the program. Just as inclusion would create no financial incentive for parents to choose sectarian schools over secular ones, it would create no government subsidy for the overall mission of

the schools. The court below asserts that a "direct financial subsidy" would flow to religious schools if the program included them, but this is not borne out by the record. The court later acknowledges that Maine's tuition allotment would cover only 70% of the actual cost of educating a student at the Catholic high school the Bagleys preferred for their son. *Bagley*, at 145. The state is not "subsidizing" a school by paying that school to educate a child at a financial loss.

In cases where this court has found aid to religious schools to be barred by the Establishment Clause, that aid was in the form of direct grants or subsidies given solely to religious schools. *Committee for Public Education and Religious Freedom v. Nyquist*, 413 U.S. 756; *Meek v. Pittinger*, 421 U.S. 349 (1975); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). In contrast, Maine essentially pays schools chosen by parents to educate students whose own school districts do not operate secondary schools. If Maine included religious schools on a neutral footing, it would merely be contracting with parents to provide a social service, as states are encouraged to do in other areas such as child care under Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. Sec. 604a. At this writing, there has not been a single Establishment Clause challenge to the provision of social services under the Act. As Petitioners state, the subsidies rejected in *Nyquist*, *Meek* and *Ball* were, essentially, *gifts* and therefore constituted direct aid to schools; vouchers are a *purchase*. And, significantly, the vendor for that purchase is selected by the parents, not the state.

The evils the Establishment Clause seeks to prevent – competition among sects and compulsion of belief – are not at issue here, because Maine's program benefits *children*, rather than *schools*.

The element of parental choice should prevent neutral inclusion of religious schools from being defined as a governmental advancement of their religious mission. In *Zobrest v. Catalina Hills School District*, 509 U.S. 1, this court held that since the parents of the child receiving assistance had initiated his placement in a sectarian school, the presence of the child's state-funded interpreter could not be attributed to state decisionmaking. *Id.*, at 10. In Maine's tuition program, school selection is also dictated by parents, and, unlike *Zobrest*, there is no government employee present who might be seen as "a graphic symbol of the 'concert or union or dependency' of church and state". *School District of Grand Rapids v. Ball*, 473 U.S. 373, 386 (1985). Maine included faith-based schools in its tuitioning program for 200 years prior to the 1981 exclusion. During that time no court, federal or state, ever held that their participation was unconstitutional.

This court has long held that the Establishment Clause does not contain " . . . [A] requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 312 (1951). Maine's blanket exclusion of religious schools manifests governmental disfavor if not hostility to religion, and therefore aggravates, rather than minimizes, the potential for division along religious lines. A perception by people of faith that their worldview is

being quarantined or treated as suspect will further undermine support for public education. The inclusion of religious schools on a neutral basis would place Maine's tuition program in a constitutionally safe ground, neither impermissibly advancing religion nor impermissibly treating it with the "callous indifference" denounced in *Zorach*.

C. Inclusion of religious schools would not lead to excessive entanglement between government and the church.

"Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall', is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman*, 403 U.S. 602. Earlier school cases in which the court grappled with questions of excessive entanglement between government and religious schools involved radically different circumstances than those present here. Claims of excessive entanglement involved either direct government subsidies to the schools or the direct provision of educational services by government employees. The questioned entanglement resulted either from measures to ensure that government employees did not participate in religious instruction (*Aguilar v. Felton*, 473 U.S. 402 (1984); *overr'd by Agostini v. Felton*, 521 U.S. 203 (1997)) or from measures to ensure that direct subsidies given to religious schools without consideration were not used for religious indoctrination. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pettinger*, 421 U.S. 349 (1975). The hands-on nature of the state aid in *Lemon* and *Meek*

required "pervasive monitoring by public authorities," *Lemon* at 615.

Since inclusion of religious schools in Maine's voucher program would allow the state a hands-off stance, without the presence of government employees and without general subsidies, the monitoring which fostered entanglement in these situations would not be necessary. School district involvement with participating schools is largely limited to writing a check for the allotted amount to the school selected by the parents. Presumably Maine evaluates schools which seek to participate in the program to discern whether they meet educational standards, but there is no reason to believe such evaluations would involve greater entanglement than the inquiries that such schools already undergo to maintain accreditation.

III. Maine's decision to fund secular educational speech by private schools but not theocentric educational speech is viewpoint discrimination forbidden by the First Amendment.

Education inherently involves speech, and the Free Speech clause is therefore deeply implicated in educational issues. The Court has recognized this in a variety of cases, ranging from *Barnett v. West Virginia*, 319 U.S. 624 (1943), to *Rosenberger v. Rector*, 515 U.S. 819 (1995). In fact, one commentator has suggested that *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which the Court defended the existence and autonomy of private schools, would have been more cogently argued and decided on First Amendment

grounds of parental "educative speech" rather than on substantive due process grounds. (Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937).

In *Rosenberger v. Rector, supra*, this court held that the exclusion of a student magazine which discussed issues from a Christian viewpoint from a program which funded publications discussing identical issues from a variety of other philosophical viewpoints was a violation of the Free Speech Clause of the First Amendment. The *Rosenberger* Court held that the University's decision to fund student publications had created a limited public forum, albeit "more in a metaphysical than in a geographic or spacial sense," *Id.*, at 829. Therefore, the Court employed the standard First Amendment analysis pertaining to such forums:

> [I]n determining whether . . . the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Rosenberger, at 829-830.

If the University of Virginia's allocation of student fees to student publications in *Rosenberger* created a limited public forum for student speech, then Maine's decision to include private schools in its tuitioning program created a limited public forum for non-governmental educational speech. According to the rule of *Rosenberger*,

Maine has a right to discriminate regarding the *contents* of that educational speech to preserve the educational purposes of that limited forum, but not to discriminate regarding the *viewpoint* of that speech.

What does this test mean when applied to the facts of this case? First, an obviously permissible *content* restriction is to limit participation in the tuitioning program to those schools which meet objective educational standards. "[States may] reasonably regulate all schools . . . and [mandate] that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Pierce v. Society of Sisters*, 268 U.S. 510, 534. For Maine to limit participation in the program to accredited schools is a reasonable and Constitutional measure to preserve the purpose of the educational forum.

What Maine *cannot* do within the limited educational forum it has created it to exclude an otherwise eligible school because of the *viewpoint* of its educational speech. Having ascertained that a given private school competently conveys knowledge about academic subjects, about which there is no dispute in this case, Maine cannot exclude that school simply because it presents those subjects from a viewpoint disfavored by the state.

It is uncontested that Maine's exclusion of faith-based schools is based on the *viewpoint* of their curriculums, rather than their *content*. Neither the state respondents nor *amici* question the academic competence of Cheverus, the Catholic high school to which the Bagleys would prefer to send their children. Neither the school district nor the court below contends, in the words of

Pierce, that Cheverus omitted subjects "essential to good citizenship", nor that it taught subjects "manifestly inimical to the public welfare." *Id.*, at 534. Cheverus was excluded from participation because it was "sectarian", which simply means that it teaches academic subjects from a theocentric viewpoint. According to *Rosenberger*, exclusion based on this criteria should be "deemed impermissible." *Id.*, at 830.

CONCLUSION

For all the foregoing reasons, *amici curiae* strongly urge this Court to grant the requested Petition for Writ of Certiorari.

Respectfully submitted,

ALLAN PARKER
Texas Bar #15505500
CLAYTON TROTTER
Texas Bar #20240500
8122 Datapoint, Suite 812
San Antonio, TX 78229
Phone: (210) 614-7157
Fax: (210) 614-6656
Counsel for Amicus Curiae
Texas Justice Foundation

Supreme Court, U.S.
FILED
SEP 13 1999
OFFICE OF THE CLERK

(5)

No. 99-163

In The

Supreme Court of the United States

CYNTHIA and ROBERT BAGLEY, GARY and CYNTHIA ST. PIERRE, DENNIS and PATRICIA COLE, RICKY and MARY THORNTON, AND JACK and STACIA FITCH,

Petitioners,

v.

RAYMOND SCHOOL DEPARTMENT, MAINE DEPARTMENT OF EDUCATION and its COMMISSIONER J. DUKE ALBANESE, TIMOTHY HUMPHREY, JANE HUMPHREY, FRANK MCDERMOTT, TIMOTHY MORIN, JOAN MORIN, TIMOTHY FITZGERALD, KEN WILLIAMS, BARBARA WILLIAMS, and the MAINE CIVIL LIBERTIES UNION,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

PETITIONERS' REPLY BRIEF

LINDA C. RUSSELL
PETRUCCELLI & MARTIN
50 Monument Square
P.O. Box 9733
Portland, Maine 04104-5033
(207) 775-0200

WILLIAM H. MELLOR
CLINT BOLICK*
RICHARD D. KOMER
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 955-1300

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE EQUAL PROTECTION ISSUE IS PROPERLY FRAMED FOR REVIEW 2

III. *BAGLEY* IS NOT CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES CONFLICT WITH OTHER STATE SUPREME COURTS AND FEDERAL APPELLATE DECISIONS 4

IV. *BAGLEY* PROVIDES AN APPROPRIATE VEHICLE TO RESOLVE THE ESTABLISHMENT QUESTION OF WHETHER RELIGIOUS SCHOOLS MUST BE EXCLUDED FROM PARENTAL CHOICE PROGRAMS 6

V. CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 8

Brusca v. Missouri, 405 U.S. 1050 (1972), *aff'g* 332 F. Supp. 275 (E.D. Mo. 1971) 8

Campbell v. Manchester Bd. of School Directors, 641 A.2d 352 (Vt. 1994) 2

Columbia Union College v. Clarke, 159 F.3d 151 (4th Cir. 1998) 7

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 5, 7, 8

Hernandez v. Commissioner, 490 U.S. 680 (1989) 2

Jackson v. Benson, 578 N.W.2d 602 (Wisc.), *cert. denied*, 119 S.Ct. 466 (1998) 2

Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999), *cert. pet. pending*, 67 U.S.L.W. 3671 (April 26, 1999) 2

Leutkemeyer v. Kaufmann, 419 U.S. 888 (1974), *aff'g* 364 F. Supp. 376 (E.D. Mo. 1973) 8

Mueller v. Allen, 463 U.S. 388 (1983) 6, 8

Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998) 2

Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976) 3, 5

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995) 6, 9

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 2

Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999), *cert. pet. pending*, 68 U.S.L.W. 3129 (Aug. 24, 1999) 1, 9

TABLE OF AUTHORITIES – Continued

Page

Tilton v. Richardson, 403 U.S. 672 (1971) 3, 5

Widmar v. Vincent, 454 U.S. 263 (1981) 9

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 5, 6, 8

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 6

I. INTRODUCTION

The tuitioning programs of Maine and Vermont are the largest, oldest, and most comprehensive[1] systems of parental school choice in the United States. Though both were religiously neutral for most of their long histories, misinterpretations of this Court's Establishment Clause cases led the Vermont Supreme Court and the Maine Legislature to exclude religious schools from parents' choices, thereby violating the Equal Protection Clause of the Fourteenth Amendment. Review of the Maine Supreme Judicial Court's decision in *Bagley v. Raymond School Department* offers this Court a timely and appropriate opportunity to correct these longstanding violations of fundamental civil liberties.

In an effort to dissuade this Court from accepting this case for review, the various respondents[2] have made a variety of arguments that misstate petitioners' arguments, mischaracterize the decision below, and misunderstand this Court's precedents. Respondents seek to obfuscate the question presented by the petition, which is whether the Maine Court is correct in its ruling that Maine is required to exclude religious schools from its otherwise neutral tuitioning system in order to avoid violating the Establishment Clause. Contrary to respondents' assertions, the Maine Court clearly had to reach this question in its decision. And just as clearly, its answer puts its decision (and the First Circuit's parallel decision in *Strout v. Albanese*, 178 F.3d 57 (1999), *cert. pet. pending*, 68 U.S.L.W. 3129 (Aug. 24, 1999)) in conflict with the decisions

---

[1] By "most complete" petitioners mean that in towns that opt to use the tuitioning system *all* children attend schools chosen by their parents because their school districts do not operate public schools for them to attend.

[2] There are two respondents' briefs, one filed by the state defendants (hereinafter the State Defendants' Brief) and the other by the Timothy Humphrey et al. and Maine Civil Liberties Union intervenors (hereinafter the Intervenors' Brief).

of four other state supreme courts[3] and a decision of the Eighth Circuit.[4]

II. THE EQUAL PROTECTION ISSUE IS PROPERLY FRAMED FOR REVIEW

The State Defendants assert that the issues that petitioners wish to present to the Court are not properly framed in the record. They assert that the petitioners have not shown that sending their sons to Cheverus, a Jesuit high school, is mandated by their religion, and imply that this showing is necessary to assertion of their equal protection claim. In so doing, the respondents have confused the Free Exercise claim[5] petitioners made in the Court below with the Equal Protection claim made below that is the only claim petitioners have chosen to ask this Court to review.[6] There is not now and

---

[3] *Campbell v. Manchester Bd. of School Directors*, 641 A.2d 352 (Vt. 1994); *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 119 S.Ct. 466 (1998); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. pet. pending*, 67 U.S.L.W. 3671 (April 26, 1999); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

[4] *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

[5] The State Defendants rely on a quotation from *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), that on its face addresses only "the free exercise inquiry."

[6] In the Court below, petitioners alleged that Maine had violated the Free Exercise rights of the Bagleys and the Establishment Clause with respect to all of the petitioners. The petitioners continue to believe that the Maine Court's rejection of those claims was clearly incorrect. Petitioners, however, elected to ask this Court only to review the rejection of their Equal Protection claim, because the resolution of that claim required the Maine Court to consider whether Maine was correct in its conclusion that the Establishment Clause required Maine to exclude the choice of religious schools, which is the same issue presented by the parental school choice cases with which the Maine decision conflicts. The State Defendants continue to attack arguments that the petitioners are not making before this Court.

never has been a requirement that to assert an equal protection claim alleging harm from a classification based on religion, as Maine's exclusion of religious schools plainly is, one must allege that a substantial burden has been placed on the observance of a central tenet of one's religion. Maine's exclusion of religious schools harms all those who have selected such schools for their children's educations, regardless of their motivation for selecting such schools.

The State Defendants also allege that the issue is not properly framed in the record because the Maine Court felt that it did not have sufficient factual information to address the entanglement prong of the *Lemon* test. Petitioners submit that the record shows that to allow families to select religious schools again, as they could prior to the exclusion of such schools in 1981, would not result in excessive entanglement of the government with religion. The Maine Court and the respondents think that it would be necessary for Maine to police the religious schools to ensure that any "aid" they receive is limited to secular aspects of the educational process, as this Court required in cases such as *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976). Those cases, however, involved direct aid to the schools as institutions, and were premised on the understanding that it is possible to separate secular and religious aspects of the educational process at those schools. The Maine tuitioning program, on the other hand, provides aid to the eligible families and not to the schools[7]; hence, if the program were religiously-neutral again, any "aid" received by a religious school would be the result of the independent choice of the parents, and therefore

---

[7] As we argued in our Petition, the mere fact that the tuition funds are transmitted directly to the schools should not be misconstrued as aid to or subsidization of the schools. The eligible families are the beneficiaries of the tuitioning program, and the schools they select are service providers, as in the many other programs we cited in our Petition at 19, footnote 16.

would not trigger a requirement to segregate funds exclusively for secular aspects of the schools' educational processes.[8] Because there would be no need to monitor the use of tuition funds by Cheverus to prevent the advancement of religion, the respondents and the Maine Court's concerns about the excessive entanglement inquiry are misplaced. As a matter of historical note, prior to its exclusion from the program in 1981, Cheverus participated in the tuitioning program without difficulty and without any special treatment being necessary.

III. *BAGLEY* IS NOT CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES CONFLICT WITH OTHER STATE SUPREME COURTS AND FEDERAL APPELLATE DECISIONS

The State Defendants assert that *Bagley* is consistent with this Court's precedents holding that "direct financial subsidies to a pervasively sectarian school for religious education is and remains unconstitutional" State Defendants Brief at 10. The State Defendants make the same mistake that the Maine Court did in *Bagley*, namely, to equate the direct transmission of tuition payments to the school with direct financial subsidies of the school. As we showed in our Petition, the fact that money is sent to a religious school does not make it a subsidy of the school. In this case, for example, if the Raymond School Department paid the tuition to Cheverus, it would merely displace the tuition the petitioners paid – in other words, Cheverus would not be any better off than

---

[8] In a pervasively sectarian school such as Cheverus High School, such an effort would be futile by definition. But that is irrelevant if the purpose of the excessive entanglement inquiry is to avoid pervasive monitoring of religious institutions to prevent government aid from advancing religion. Here the school is admittedly pervasively sectarian, but no monitoring with respect to religion would be required at all, because the aid would be provided to the parents in full compliance with the religion clauses' requirement of governmental neutrality.

before, a strange sort of "subsidy."[9] The obvious beneficiaries of the tuition are the families like the petitioners who are otherwise liable for the tuition payments.[10]

By incorrectly viewing tuitioning as a direct subsidy program, the State Defendants (and the Maine Court) fail to see that this Court's decision in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), does not control the outcome of this case and that cases subsequent to Nyquist like *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), are much closer to being on point. *Nyquist* itself in footnote 38, 413 U.S. at 782-83 n.38, makes clear that this Court was reserving judgment on programs like Maine's used to be when it included religious schools among the options parents could choose. And *Witters* makes it clear that where the program is religiously neutral and leaves the choice of institution up to the independent choice of the beneficiaries there is no Establishment Clause violation even if the school selected is pervasively religious and the education obtained religious in nature.

The State Defendants make the same mistake in their failed effort to distinguish the decisions of the Arizona, Ohio, Vermont, and Wisconsin Supreme Courts and the Eighth Circuit. They simply take for granted that the Maine Supreme Judicial Court is correct in its conclusion that to pay religious schools tuition is to provide direct financial subsidies to those

---

[9] A school like Cheverus, which has a waiting list, does not lack for paying customers. Although the respondents have never noted it, the only real financial benefit to Cheverus from participation in the tuitioning program is that it would be relieved from providing scholarship assistance to several of the petitioners who need it and could aid other families.

[10] Obviously, a decision ultimately favorable to petitioners can be viewed as beneficial to religious schools that subsequently participate in the tuitioning program, but such benefits are plainly indirect and derive not from the direct transmission of tuition payments but rather from the increased number of students who would now be able to partake of their services. Such effects are far more attenuated than the benefits schools such as those in *Tilton* and *Roemer* receive from the institutional aid provided under those programs.

schools. Since those other cases found that any financial benefit to the schools involved in those other programs was indirect and attenuated, the State Defendants find those cases distinguishable. They simply fail to address the reason those other courts found the aid to be indirect and attenuated, a reason that applies with equal force to Maine's tuitioning program. That reason is, of course, that any benefit received by religious schools is the product of the free and independent choices of the families under a program that provides no incentive to select a religious rather than a nonreligious alternative, the rationale underpinning this Court's decisions in *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters*; *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). The Bagley holding creates a direct conflict with these precedents.

IV. *BAGLEY* PROVIDES AN APPROPRIATE VEHICLE TO RESOLVE THE ESTABLISHMENT CLAUSE QUESTION OF WHETHER RELIGIOUS SCHOOLS MUST BE EXCLUDED FROM PARENTAL CHOICE PROGRAMS

The Intervenors make the curious argument that *Bagley*, in which the Maine Court explicitly held that the Establishment Clause precluded Maine from including religious schools in its tuitioning program, is not an "appropriate" vehicle for this Court to review the question of whether "voucher" programs can include religious schools. This is, of course, nonsensical. The Maine Court has held that Maine was constitutionally required to exclude religious schools from its program because their inclusion would be impermissible under the First Amendment, and this decision is in clear and direct conflict with those courts that have held that school choice programs can include such schools.[11]

To support their position, Intervenors are driven to distort the decision below and to grossly mischaracterize petitioners'

---

[11] See the cases cited in footnote 3, *supra*.

arguments. They argue that the Maine Court held that the petitioners lacked standing to assert their equal protection claim, which the court clearly did not hold,[12] and that petitioners are arguing that Maine's exclusion of religious schools only became "irrational" because of Supreme Court cases decided since Maine's 1981 exclusion of religious schools, which petitioners have never claimed. Petitioners have argued throughout this litigation that Maine's exclusion of religious schools violated the equal protection clause when passed in 1981[13] and continues to violate that clause, with this Court's post-1981 jurisprudence serving to confirm that *Nyquist* does not apply to nor invalidate Maine's former practice of tuitioning to religious schools on an equal basis as secular schools.[14]

---

[12] In the decision below, the Maine Court concluded that "the parents present an important [Equal Protection] issue worthy of evaluation", Pet. App. at 19, and then proceeded to evaluate the claim for the next 26 pages, the vast majority of its decision. Pet. App. at 19-45. Nor do the Intervenors cite a single case (since none exist) to support the idea that parents wishing to use their tuition allotments at a religious school lack standing to challenge the exclusion of religious schools from the program. The Maine Court's statement that "Ordinarily, the Equal Protection claim here would be asserted, not by potential clients of the excluded institution, but by the school itself" merely reflects the Court's mistaken view of the program as providing institutional aid (direct financial subsidies) to the participating schools, as evidenced by the Court's citation for its statement to *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), an institutional aid case.

[13] We do not read Intervenors' Brief as challenging the Maine Court's conclusions that "the Legislature enacted the exclusion in direct response to developments in Establishment Clause jurisprudence in the 1970's." Pet. App. at 24, and that the exclusion was in fact adopted to avoid a violation of that Clause. The language of the exclusion itself and its genesis leave no doubt as to the actual purpose of the Legislature in enacting the change. Intervenors are reduced to creating a fictional claim that petitioners are arguing only that the exclusion became irrational some time after enactment.

[14] Intervenors cite to petitioners' reference in our Petition to this Court's post-*Nyquist* cases upholding aid to families selecting religious schools for their specious assertion that we claim that there is no longer a

Intervenors assert that this case is not appropriate for review because there are no facts on the percentages of families selecting religious options (a fact they view as critical under *Nyquist*) due to the fact that religious schools have been excluded from the program since 1981.[15] Their misrepresentation also allows them to conveniently ignore the fact that the data they assert are so necessary to evaluation of this issue *exists in the record for 1980*, the last year before Maine excluded the religious schools. As we noted in our Petition, according to the State Defendants only 211 (1.2%) of Maine's 17,928 tuitioned students attended religious schools. By the Intervenors' own theory then, the facts of this case distinguish it from *Nyquist*. Moreover, if any case is relevant to *Bagley*, it must be *Witters*, where the opinion notes that few if any other beneficiaries selected a religious education option. *Witters*, 474 U.S. at 488.

Intervenors also claim that two summary affirmances by this Court, *Brusca v. Missouri*, 405 U.S. 1050 (1972), *aff'g* 332 F. Supp. 275 (E.D. Mo. 1971), and *Leutkemeyer v. Kaufmann*, 419 U.S. 888 (1974), *aff'g* 364 F. Supp. 376 (E.D. Mo. 1973), should have led the Maine Court to reject petitioners' equal protection claim. These cases are so readily distinguishable that one wonders why the Intervenors suggest

---

rational basis for excluding religious schools. Intervenors' Brief at 17, referencing Pet. at 13. As the immediately preceding paragraph of our Petition makes obvious, we argue that *Nyquist* never applied to a religiously-neutral parental-choice program like Maine's by specifically reserving that question. Pet. at 12.

[15] Petitioners, of course, do not agree that how many families select a religious education option should be dispositive where the program is religiously-neutral and where parents make the choice of school they want their children to attend. *See Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law"); and *Agostini v. Felton*, 521 U.S. 203, 229 (1997) ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid").

they should have controlled resolution of this claim. In both cases, the claim was that because the state funded secular public schools it violated equal protection not to fund private religious schools or the transportation of pupils thereto. The classification challenged in those cases was public versus private schools, a line not drawn on the basis of religion. In *Bagley*, on the other hand, there are no public schools operated by tuitioning districts and the challenged classification is explicitly on the basis of religion: secular schools, whether public or private, can be chosen, while religious schools cannot.

In short, the Intervenors would have this Court believe that although *Bagley* presents the concededly important issue of "whether and under what circumstances public funds may be used to pay for pupils to attend sectarian private schools without violating the Establishment Clause," it does so in a "muddled, hypothetical posture" rendering it inappropriate for review. Intervenors' Brief at 18. Petitioners submit that it is not *Bagley* that is muddled, but rather Intervenors' arguments. The Establishment Clause issue presented in *Bagley* is no more "hypothetical" than the similar Establishment Clause issues in such cases as *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger*, to name just two examples of other cases where defendants have asserted that the Establishment Clause required them to exclude based upon religion and this Court had to rule on the validity of the defense.

Nor should this Court accept the Intervenors' suggestion, based on Judge Campbell's concurring opinion in *Strout*, that a rational fear that a state might violate the Establishment Clause suffices to justify the exclusion of the religious options of parents. Such a position would allow the infringement of fundamental First and Fourteenth Amendment liberties whenever government had to face a difficult constitutional question. That is not now and, we trust, never will be, the position of this Court.

V. CONCLUSION

The Respondents in this case fear that this Court will accept the instant case for review, because they are aware of the degree to which the Maine Supreme Judicial Court misread, misunderstood, and misapplied this Court's Establishment Clause precedents. Their briefs in opposition to the Petition seek to misdirect the attention of this Court from the central holding of the Maine Court, which of necessity addressed petitioners' claim that Maine's exclusion of religious schools lacked sufficient justification to withstand *any* level of equal protection scrutiny because it misinterpreted the Establishment Clause. The *Bagley* decision squarely and unequivocally conflicts with decisions of other state supreme courts and a federal appellate court that have addressed the same issue in recent years, and the time is ripe for this Court to resolve the conflict. Petitioners urge this Court to grant their Petition and provide lower courts, and state legislatures, with the guidance they so sorely need.

Respectfully submitted,

LINDA C. RUSSELL
PETRUCCELLI & MARTIN
50 Monument Square
P.O. Box 9733
Portland, Maine 04104-5033
(207) 775-0200

WILLIAM H. MELLOR
CLINT BOLICK*
RICHARD D. KOMER
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 955-1300

Attorneys for Petitioners

**Counsel of Record*